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The University of Michigan: Its Legal Profile

William B. Cudlip

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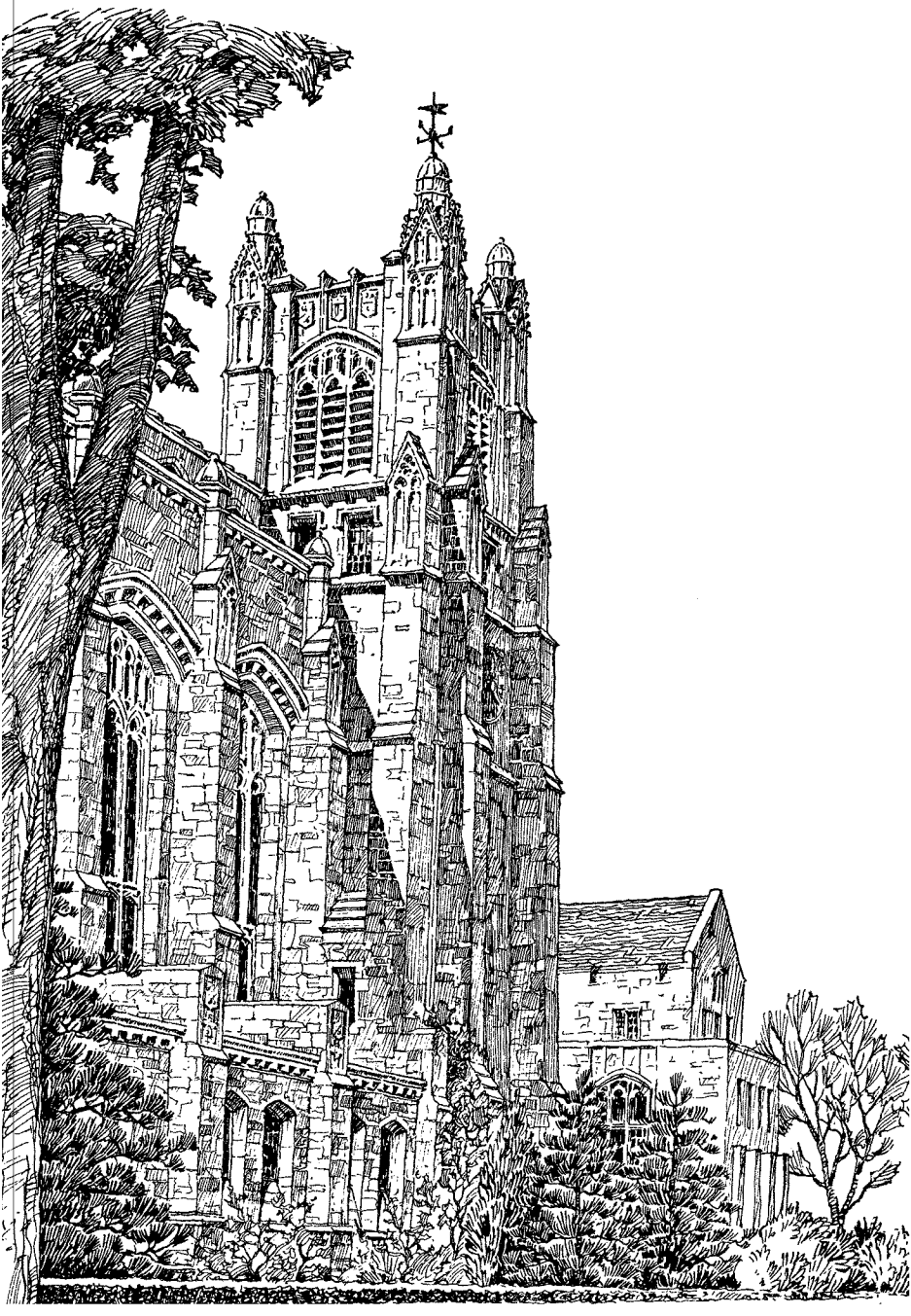

THE UNIVERSITY OF MICHIGAN: ITS LEGAL PROFILE

by

William B. Cudlip, J.D.

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ACKNOWLEDGMENTS

I suppose that lawyers are always curious about the legal history of any institution with which they are affiliated. As the University of Michigan approached its One Hundred Fiftieth year, my deep interest was heightened as I wondered about the legal structure and involvements of this durable edifice over that long period of time. This compendium is the result and I acknowledge the help that I have had. My secretaries, Mrs. Henry Herber, Mrs. James M. McCracken and Mrs. Milton W. Fuehrer, have been so patient and helpful in all ways, but especially in those tedious tasks of proofreading, typing and retyping.

Professor William J. Pierce of the University of Michigan Law School, along with Robert Berger, a graduate student at the University of Michigan Law School, and Dean Charles W. Joiner of Wayne State University Law School have been of great assistance with their many suggestions as to format and content. Professor Pierce and Mr. Berger brought combined interest and experience to the task of suggesting orderly presentation of subject matter, weaving all together with clear and connective narrative. Their aid has been of inestimable value. Jay A. Rosenberg, a student at the Law School, was kind enough to assist in studying the records of suits instituted by or against the University in the Circuit Court for Washtenaw County, Michigan.

The Clerk for the City of Ann Arbor, Mr. Look, graciously aided in our search for ordinances of the Village and City as they pertained to the University and contracts between the University and the City. None were deemed of significance, except the contract between the City of Ann Arbor and the University relating to police and fire protection of the University area and property.

I am grateful to the Attorney General for Michigan, The Honorable Frank Kelley, and to his assistants, Mrs. Eugene Wanger and Miss Hilma B. Stelljes, for their many courtesies in helping me locate opinions of the Attorney General relating to

the University and permitting me to study them in the Lansing offices of the Attorney General.

I made generous use of the Detroit Public Library and the Detroit Bar Association Library and the assistants at both places were most pleasing and helpful.

WILLIAM B. CUDLIP

June, 1969

FOREWORD

Inspiration for the preparation of this volume came from reading two sections of Volume I of the four-volumes published in 1942 entitled, *The University of Michigan–An Encyclopedic Survey.* One section by E. Blythe Stason, Dean Emeritus of the University's Law School, is captioned "The Constitutional Status of the University of Michigan." The other section captioned "The Organization, Powers and Personnel of the Board of Regents" was prepared by the Dean and the late Wilfred B. Shaw, long connected with the University in important administrative capacities and intimately acquainted with its history.

The material here presented duplicates in part that contained in these two sections. It is intended to be more specific and, in some respects, it is much more expansive. Moreover, it speaks of developments since the year 1942 when the survey was published.

If occasionally it has value to those charged with administering the affairs of the University and educational institutions of similar constitutional posture, the efforts in publishing this volume will be well rewarded.

Subjects not treated in this volume are as follows:

(a) Federal laws, such as those granting financial aid and other assistance, under which the federal government assists universities and colleges alone or in connection with other governmental units, and state aid and assistance laws.

(b) Statutes of Michigan appropriating funds for the support and maintenance of the University.

(c) Statutes known as "millage tax laws," the first of which was enacted in 1867. This form of financial support for the University is no longer employed. When used there was imposed on property in the State, subject to ad valorem taxes, a millage tax in varying amounts based on assessed valuation.

(d) General laws of the State of Michigan applicable to all citizens.

(e) Proceedings involving the University of Michigan before state and local boards and commissions, and before municipal and justices courts.

The legislative history of the University is extremely interesting. It begins with the territorial laws enacted in 1817 and continues to date. Michigan was admitted to the Union in 1837 and thereafter a legislature as constituted by the Constitution of the State, adopted in 1835 and re-adopted in 1837, enacted the laws.

There was a revision of the State statutes in 1837 and 1846. Since then pursuant to law, from time to time compilations of statutes have been prepared. The generally recognized compilations were made in the years 1857, 1871, 1882, 1890, 1897, 1912, 1915, 1929 and 1948.

In this volume the general history of significant laws enacted by the Territorial Council and by the State Legislature for each year from 1817 are considered and sufficiently treated in the Stason and Price articles contained in this volume (Chapters I & V) and in Chapter III which discusses current statutes pertaining to the University and their history.

It appears that no significant statutes enacted since 1817 have been enacted and then repealed, save perhaps the "millage" tax laws. Inconsequential laws were passed and repealed. A summary of all important statutes in force at this time is set forth.

A university has many gleaming facets: governing board, administrative officers, faculty, students, alumni and, yes, many friends. The story of great institutions can be revealed in diverse ways, through the means of various media such as histories, articles and other writings. Surprisingly, perhaps, given antiquity of a sort, such institutions sooner or later are bound to become enmeshed in law for one reason or another. This is particularly true of entities which are public institutions, such as the University of Michigan. Given this age, these laws, whether expressed in decisions or statutes, often tell much of interest as to the history, traditions, growth, rights and responsibilities of such bodies. The history and drama is slowly and haphazardly unfolded, but for the reader it is there.

WILLIAM B. CUDLIP

June, 1969

CAPSULE HISTORY OF UNIVERSITY OF MICHIGAN

With the thought that some perspective concerning the University's general history may be useful to one examining this volume, it seems desirable to mention in chronological order some of the main happenings in the one and one-half centuries of the life of this great educational institution.

Year	Event
1787	Congress adopted the Ordinance of 1787 providing for the government of the Northwest territories and the implanting of educational facilities therein.
1805	Territory of Michigan was organized and lands granted for educational purposes.
1817	Organization of a supervisory body known as the Catholepistemiad of Michigania in Detroit, Michigan. Initiation of Fort Meigs treaty by Territorial Governor Cass with Indians providing, among other things, for three sections of land for support of a territorial institution of higher learning.
1821	Congressional act setting aside two townships for use and support of a University within the Territory of Michigan. Creation of "University of Michigan" with changes in 1817 law. The new act provided for state-wide branches of the University.
1835	State Constitution adopted with recognition of the University and means for its support.

Year	Event
1836	Opening of building on Bates Street, Detroit, for admission of first students.
1837	Michigan admitted to Union as a State. University moved from Detroit to Ann Arbor.
	Forty-eight thousand acres of land given by United States to State of Michigan in trust for support of schools.
	Enactment by legislature of organic act of the University.
1841	Opening of University at Ann Arbor. Completion of first buildings. The first class held in Mason Hall consisted of seven students. There were two faculty members.
1850	Effective date of new state Constitution which created new and independent status for the University. Opening of Department of Medicine and Surgery.
1852	Appointment of President Henry Philip Tappan.
1860	Opening of Law Department.
1861-65	Interruptive Civil War and thereafter vigorous growth of institution.
1863	Appointment of President Erastus Otis Haven.
1867	Inauguration by legislature of the novel device of a millage tax for University support.
1869	Appointment of Henry Simmons Frieze as Acting President.

Year	Event
1869-70	Beginning of Douglas-Rose controversy
1871	Appointment of James Burrill Angell as President. Beginning of stable growth of the University.
1908	Effective date of new state Constitution which retained 1850 constitutional posture of University.
1909	Appointment of Harry Burns Hutchins as President.
1917-18	World War I, again followed by period of stimulus to all aspects of University life.
1920	Appointment of Marion LeRoy Burton as President.
	Huge and much-needed building program was commenced.
1925	Appointment of Clarence Cook Little as President.
1929	Appointment of Alexander Grant Ruthven as President.
	Beginning of additional building program of large dimensions.
1941-45	World War II, followed by marked growth in student body and research and educational efforts.
1951	Appointment of Harlan Henthorn Hatcher as President.

Year	Event
1951	Vast increase in student body and continued expansion of facilities for educational and research purposes.
1964	Effective date of new state Constitution which retains 1850 and 1908 constitutional posture of University.
1968	Appointment of Robben W. Fleming as President.

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"For the University of Michigan

Law School, Class of 1926."

"For while freedom is the corner stone of our political fabric, intelligence is the cement that holds its several parts together." —Justice Manning. *The Regents of The University of Michigan vs. The Detroit Young Men's Society,* 12 Mich. 138, 164 (1863).

Part One

The Legal History of the University of Michigan; Development of the Autonomous Constitutional Corporation.

CHAPTER I

THE EARLY HISTORY OF THE UNIVERSITY AND SUBSEQUENT CHANGES MADE BY CONSTITUTIONAL CONVENTIONS

1. INTRODUCTION

Dean Stason's article on the Constitutional Status of the University of Michigan is—as stated in the Foreword—the inspiration for this book. This first chapter contains generous excerpts from that article and its appendices which review the early legal history of the University and the constitutional provisions under which it is governed. These excerpts are followed by a brief comment describing the changes brought forth since the Stason article by the new constitution adopted in 1963. The essence of the case of the *Regents v. Board of Education of City of Detroit* is included in this chapter for its definitive review of the early legal history of the University.

E. Blythe Stason, THE CONSTITUTIONAL STATUS OF THE UNIVERSITY OF MICHIGAN

1 The University of Michigan—An Encyclopedic Survey 116 (1942), University of Michigan Press.

> The foundations of the constitutional status of the University of Michigan were laid long prior to the writing of specific provisions into the constitution of the state. The roots of those provisions are to be found in the early history of the Northwest Territory and in the early efforts to establish education as one of the necessary functions of government. . . .
>
> On May 20, 1785, the Congress adopted "an ordinance for ascertaining the mode of disposing of lands in the western country," establishing a system of rectangular land surveys for the new country. The ordinance contained the forward looking provision that

"there shall be reserved the lot No. 16 of every township for the maintenance of public schools within the said township." The significance of this early provision can scarcely be overestimated. It gives evidence of a recognition by the central government of its obligation and duty to provide at government expense for education within the Northwest Territory—this in a day when public schools were almost an unknown phenomenon, even in the states already established.

Two years later, on July 13, 1787, the Congress adopted the measure, known as the Ordinance of 1787, entitled "An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio," and on July 23 of the same year a supplementary measure was adopted, entitled "Powers to the Board of Treasury to Contract for the Sale of Western Territory." These two enactments were a part of the same general plan, and each of them contained important provisions concerning education. The earlier of the two, i.e., the ordinance, contained the often quoted general declaration: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged" (Northwest Ordinance, Art. 3).

The supplementary measure of July 23 was more specific. It reiterated the grant of 1785 allocating lot No. 16 in each township "to be given perpetually for the purpose of maintenance of the public schools within the township," and, more importantly so far as the University is concerned, it added:

[Not more than two complete townships] shall be given perpetually for the purpose of a university, to be laid off by the purchaser or purchasers as near the centre as may be, so that the same shall be of good land, to be applied to the intended object by the legislature of the state.

These three measures, adopted by the Congress of the Confederation and, in effect, made a part of the fundamental law of the Northwest Territory, established a unique and valuable policy with respect to the encouragement and support of both elementary and higher education. Furthermore, it was a policy of remarkable vitality, as is amply attested by the fact that it has ever since been reflected to a greater or less extent in the fundamental law of the part of the Territory carved out in 1837 to form the state of Michigan.

In 1817 the predecessor of the University, the Catholepistemiad, was established by a territorial act (II *Terr. Laws,* 1817, p. 104), and in 1821, by a new enactment, the University itself was created as a "body politic and corporate" (I *Terr. Laws,* 1821, p. 879).

In pursuance of the policy established by the ordinances of 1785 and 1787, the Congress on May 20, 1826, passed the following measure:

[The Secretary of the Treasury is hereby authorized] to set apart and reserve from sale out of any of the public lands within the Territory of Michigan to which the Indian title has been extinguished a quantity of land not exceeding two entire townships for the use and support of a university. (4 *U.S. Stat. L.* 180.)

The grant was early accepted by the state (*Laws,* 1835-36, p. 149), and the Congress confirmed the selection of lands (5 *U.S. Stat. L.* 59). The superintendent of public instruction was directed to sell not to exceed five hundred thousand dollars' worth of these lands and to deposit the proceeds to the credit of a University interest fund (*Laws,* 1837, p. 209). The fund thus established, together with income in the form of fees and miscellaneous gifts, constituted the principal source of financial support of the University of Michigan until 1867. In that year additional financial aid was sought and obtained from the state legislature. The interest fund even today amounts to a considerable sum–about $38,000 per year. . . .

This federal territorial policy of providing both encouragement and continuing fiscal support for the University was subsequently carried on by the state in a wise and generous way. On the fiscal side, after the interest fund became insufficient to care for the needs of the growing institution, the "mill-tax" laws were passed to provide the necessary funds. The first of these laws, passed in 1867, consisted of an appropriation for the support of the University of a sum equal to one-twentieth of a mill on each dollar of taxable property in the state. Perhaps the most valuable and certainly the unique feature of this measure and its successors was their continuing nature, i.e., instead of being biennial appropriations, they were in reality permanent laws continuing from year to year until changed by subsequent affirmative legislative enactment. They thus approximated the permanence of the federal land endowment for the University. They gave the institution the stability enjoyed by the large privately endowed schools of the East. With some variations the policy of this mill-tax law of 1867 has been continued until the present day, and, although it is a statutory rather than a constitutional device, it has become so thoroughly a part of the accepted legislative practice and of the tradition of the state as virtually to share the permanent status of fundamental law. (See Appendix A, . . . for a list of the mill-tax acts.) It constitutes one of the major reasons for the fact that the University of Michigan has attained a first place among the state universities of the country.

THE CONSTITUTION OF 1835.—When Michigan adopted its first constitution, in 1835, two express provisions were written into the fundamental law concerning higher education. (See Appendix B, . . . for full text of provisions for University and public-school support in the Constitution of 1835.) One of these, section 2 of Article X, was general and followed the style set by the similar declaration in the Ordinance of 1787. It stipulated that "the legislature shall encourage by all suitable means the promotion of intellectual, scientific, and agricultural improvement." The other provision was more specific. In section 5 of Article X was the requirement:

. . . . the legislature shall take measures for the protection and improvement or other disposition of such lands as have been or may hereafter be reserved or granted by the United States to this state for the support of a university; and the funds accruing from the rents or sale of such lands or from any other source for the purpose aforesaid shall be and remain a permanent fund for the support of said university.

These provisions were written into the constitution in an effort to pursue the policy established by the national government during territorial days. They were good so far as they went; however, they left full power in the legislature to manage the affairs of the University, to regulate the appointment of the Regents, to establish or abolish departments, to regulate the appointment of professors, and to control expenditures from the University funds. In short, they left the internal administration of the University fully subject to the changing desires of the political arena at the state Capitol, then in Detroit.

In spite of early efforts to build the University into a strong institution, success and prosperity were not achieved in the period between 1835 and the revision of the constitution in 1850. The more thoughtful public men of the time felt that one of the reasons for the failure of the University to develop rapidly was the fact that its functioning was dependent upon and subject to the changing policies of the legislature. They felt that under such conditions the University could not attain the degree of stability, permanence, independence, and strength enjoyed by the denominational and endowed colleges of the East. The shortcomings were functional rather than fiscal.

In 1840 a select committee was appointed by the legislature to inquire into the condition of the University. A part of the report of the committee indicates clearly the consensus of contemporary opinion concerning higher education in the state.

"No State institution in America has prospered as well as independent colleges with equal, and often with less, means. Why they have not may be ascribed, in part, to the following causes: They have not been guided by that oneness of purpose and singleness of aim (essential to their prosperity) that others have whose trustees are a permanent body,—men chosen for their supposed fitness for that very office, and who, having become acquainted with their duties, can and are disposed to pursue a steady course, which inspires confidence and insures success, to the extent of their limited means. State institutions, on the contrary, have fallen into the hands of the several legislatures, fluctuating bodies of men, chosen with reference to their supposed qualifications for other duties than cherishing literary institutions. When legislatures have legislated directly for colleges, their measures have been as fluctuating as the changing materials of which the legislatures were composed. When they have acted through a board of trustees, under the show of giving a representation to all, they have appointed men of such dissimilar and discordant characters and views that they never could act in concert; so that, whilst supposed to act for and represent everybody, they, in fact, have not and could not act for anybody.

Again, legislatures, wishing to retain all the power of the State in their own hands, as if they alone were competent or disposed to act for the general good, have not been willing to appoint trustees for a length of time sufficient for them to become acquainted with their duties, to become interested in the cause which they were appointed to watch over, and feel the deep responsibility of the trust committed to them. A new board of trustees, like a legislature of new members, not knowing well what to do, generally begins by undoing and disorganizing all that has been done before. At first they dig up the seed a few times, to see that it is going to come up; and, after it appears above the surface, they must pull it up, to see that the roots are sound; and they must pull it up again, to see if there is sufficient root to support so vigorous branches; then lop off the branches, for fear they will exhaust the root; and then pull it up again, to see why it looks so sickly and pining, and finally to see if they can discover what made it die. And, as these several operations are performed by successive hands, no one can be charged with the guilt of destroying the valuable tree. Whilst State institutions have been, through the jealousy of State legislatures, thus sacrificed to the impatience and petulance of a heterogeneous and changeable board of trustees, whose term of office is so short that they have not time to discover their mistakes, retrace their steps, and correct their errors, it is not surprising that State universities have hitherto, almost without exception, failed to accomplish, in proportion to their means, the amount

of good that was expected from them, and much less than colleges in their neighborhood, patronized by the religious public, watched over by a board of trustees of similar qualifications for duty, and holding the office permanently, that they may profit by experience.

The argument by which legislatures have hitherto convinced themselves that it was their duty to legislate universities to death is this: "It is a State institution, and we are the direct representatives of the people, and therefore it is expected of us; it is our right. The people have an interest in this thing, and we must attend to it." As if, because a university belongs to the people, that were reason why it should be dosed to death for fear it would be sick, if left to be nursed, like other institutions, by its immediate guardians. Thus has State after State, in this American Union, endowed universities, and then, by repeated contradictory and over legislation, torn them to pieces with the same facility as they do the statute book, and for the same reason, because they have the right." (2 *H. Doc.*, 1840, p. 470.)

THE CONSTITUTION OF 1850.—Such was the condition of affairs when the constitutional convention of 1850 met. Any reader of the debates of that convention will be impressed with the attitude of the delegates toward higher education. They recognized the need of removing the University from changing political influences and yet keeping it directly responsible and amenable to the people (*Debates*, pp. 782-85, 804, 846).

As a result of the work of the convention, provisions were therefore written into the Constitution of 1850 (Art. XIII) to establish the University as an independent constitutional corporation under the control of a Board of Regents elected directly by the people. The Board was made a body corporate, to be known by the name and title of "The Regents of the University of Michigan." Then followed the all-important clause: "The Board of Regents shall have the general supervision of the University and the direction and control of all expenditures from the University interest fund." By virtue of these provisions a quasi-independent constitutional corporation was substituted for the prior dependent statutory agency, and a permanent and stable educational plan for the University of Michigan was brought into being. Responsibility directly to the people of the state was substituted for responsibility to the state legislature. (For the full text of University provisions in the amended Constitution of 1850, see Appendix C. . . .)

* * *

THE CONSTITUTION OF 1908.—. . . The provisions of [the Constitution of 1908] were similar to those of the Constitution of 1850 insofar as the University was concerned. Section 5 of Article XI stipulated that "the Board of Regents shall have the general supervision of the University and the direction and control of all expenditures from the *University funds.*" (The full text of University provisions in the Constitution of 1908 is given in Appendix D . . .) The word "interest," which had followed the word "University" in the Constitution of 1850, was omitted, and the word "fund" was changed to "funds," thus placing all University funds—the University interest fund, legislative appropriations, and funds from other sources—under the exclusive control of the Board of Regents.

* * *

By the Constitution of 1908 the State Board of Agriculture [was] vested with the power of government of the Michigan Agricultural College, and the constitutional convention was so well satisfied with the functioning of the University under the provisions of the Constitution of 1850 that a similar constitutional status was conferred upon the college. In Article XI, section 8, the new constitution stipulated that "the Board [State Board of Agriculture] shall have general supervision of the College and the direction and control of all Agricultural College funds"—a clause practically identical with the corresponding University clause.

APPENDIX A*

MILL-TAX ACTS.—The various mill-tax acts of the state of Michigan are as follows:

Laws, 1867, No. 59, p. 86: 1/20 of a mill.
Laws, 1869, No. 14, p. 19: $15,000.
Laws, 1873, No. 32, p. 32: 1/20 of a mill.
P.A., 1893, No. 19, p. 19: 1/6 of a mill.
P.A., 1893, No. 53, p. 56: 1/6 of a mill.
P.A., 1899, No. 102, p. 146: 1/4 of a mill.
P.A., 1907, No. 303, p. 398: 3/8 of a mill.
P.A., 1921, No. 247, p. 46: 6/10 of a mill.

*Information on more recent state support for the University is found in Chapter V.

P.A., 1923, No. 252, p. 400: 6/10 of a mill.
P.A., 1925, No. 324, p. 476: 6/10 of a mill; total not to exceed $3,700,000.
P.A., 1927, No. 404, p. 953: 6/10 of a mill.
P.A., 1931, No. 319, p. 545: 6/10 of a mill; total not to exceed $4,928,852.55.
P.A., 1935, No. 11, p. 23: repeal of act of 1873.
P.A., 1935, No. 112, p. 180: appropriation of a sum equal to 73/100 of a mill.
P.A., 1937, No. 147, p. 230: appropriation of a sum equal to 83/100 of a mill but not to exceed $4,673,253.58.

APPENDIX B

SCHOOL AND UNIVERSITY PROVISIONS IN THE CONSTITUTION OF 1835.—The full text of sections 2 and 5 of Article X of the Constitution of 1835 is as follows:

Perpetual fund for support of schools. 2. The legislature shall encourage, by all suitable means, the promotion of intellectual, scientifical and agricultural improvement. The proceeds of all lands that have been or hereafter may be granted by the United States to this state, for the support of schools, which shall hereafter be sold or disposed of, shall be and remain a perpetual fund; the interest of which, together with the rents of all such unsold lands, shall be inviolably appropriated to the support of schools throughout the state. . . .

University fund. 5. The legislature shall take measures for the protection, improvement or other disposition of such lands as have been or may hereafter be reserved or granted by the United States to this state for the support of a university; and the funds accruing from the rents or sale of such lands, or from any other source for the purpose aforesaid, shall be and remain a permanent fund for the support of said university, with such branches as the public convenience may hereafter demand for the promotion of literature, the arts and sciences, and as may be authorized by the terms of such grant; and it shall be the duty of the legislature, as soon as may be, to provide effectual means for the improvement and permanent security of the funds of said university.

APPENDIX C

UNIVERSITY PROVISIONS IN THE CONSTITUTION OF 1850.—As amended in 1862, the full text of the provisions of the Constitution of 1850 relating to the University is as follows:

School fund. Sec. 2. The proceeds from the sales of all lands that have been or hereafter may be granted by the United States to the state for educational purposes, and the proceeds of all lands or other property given by individuals or appropriated by the state for like purposes, shall be and remain a perpetual fund, the interest and income of which, together with the rents of all such lands as may remain unsold, shall be inviolably appropriated and annually applied to the specific objects of the original gift, grant, or appropriation. . . .

Regents of university; election. Sec. 6. There shall be elected in the year eighteen hundred and sixty-three, at the time of the election of a justice of the supreme court, eight regents of the university, two of whom shall hold their office for two years, two for four years, two for six years, and two for eight years. They shall enter upon the duties of their office on the first of January next succeeding their election. At every regular election of a justice of the supreme court thereafter there shall be elected two regents whose term of office shall be eight years. When a vacancy shall occur in the office of regent, it shall be filled by appointment of the governor. The regents thus elected shall constitute the board of regents of the University of Michigan.

Same; body corporate. Sec. 7. The regents of the university and their successors in office shall continue to constitute the body corporate, known by the name and title of "The Regents of the University of Michigan."

President of university; supervision by regents. Sec. 8. The regents of the university shall, at their first annual meeting, or as soon thereafter as may be, elect a president of the university, who shall be *ex officio* a member of their board, with the privilege of speaking but not of voting. He shall preside at the meetings of the regents and be the principal executive officer of the university. The board of regents shall have the general supervision of the university, and the direction and control of all expenditures from the university interest fund. . . .

Agricultural school; appropriation; transfer to university. Sec. 11. The legislature shall encourage the promotion of intellectual scientific and agricultural improvement; and shall, as soon as practicable, provide for the establishment of an agricultural school. The legislature may appropriate the twenty-two sections of salt spring lands now unappropriated, or the money arising from the sale of the same, where such lands have been already sold, and any land which may hereafter be granted or appropriated for such purpose for the support and maintenance of such school, and may make the same a branch of the university, for instruction in agriculture and the natural sciences connected therewith, and place the same under the supervision of the regents of the university.

APPENDIX D

UNIVERSITY PROVISIONS IN THE CONSTITUTION OF 1908.– The full text of the provisions of the Constitution of 1908 which relate to the University is as follows:

ARTICLE XI

Encouragement of education. Section 1. Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

Regents of university; election, term, vacancy. Sec. 3. There shall be a board of regents of the university, consisting of eight members, who shall hold the office for eight years. There shall be elected at each regular biennial spring election two members of such board. When a vacancy shall occur in the office of the regent it shall be filled by appointment of the governor.

Same; name. Sec. 4. The regents of the university and their successors in office shall continue to constitute the body corporate known as "The Regents of the University of Michigan."

University; president; supervision. Sec. 5. The regents of the university shall, as often as necessary, elect a president of the university. The president of the university and the superintendent of public instruction shall be *ex officio* members of the board of regents, with the privilege of speaking but not of voting. The president shall preside at the meetings of the board and be the principal executive officer of the university. The board of regents shall have the general supervision of the university and the direction and control of all expenditures from the university funds.

Educational institutions; maintenance. Sec. 10. The legislature shall maintain the university, the college of mines, the state agricultural college, the state normal college and such state normal schools and other educational institutions as may be established by law.

Proceeds of school land. Sec. 11. The proceeds from the sales of all lands that have been or hereafter may be granted by the United States to the state for educational purposes and the proceeds of all lands or other property given by individuals or appropriated by the state for like purposes shall be and remain a perpetual fund, the interest and income of which, together with the rents of all such lands as may remain unsold, shall be inviolably appropriated and annually applied to the specific objects of the original gift, grant or appropriation.

ARTICLE XIII

Regents of university; power of eminent domain. Sec. 4. The regents of the university of Michigan shall have power to take private property for the use of the university in the manner prescribed by law.

2. CHANGES MADE BY THE CONSTITUTION OF 1963

The constitution adopted in 1963 (for text see pp. 14) reconfirmed the constitutional status of the University of Michigan. The changes which the constitutional convention did make in the provisions for state-supported institutions of higher education demonstrated the convention's high regard for the form of government previously established for the University of Michigan.

The major change made in the Education Article of the constitution was the extension of the constitutional status formerly enjoyed only by the University of Michigan, Michigan State University, and Wayne State University, all created by constitution, to other state-assisted institutions created by statute. The University of Michigan was a creature of statute until the adoption of the Constitution of 1850.

The new constitution uses the same language for each of the state's "Big Three" universities—the University of Michigan, Michigan State University, and Wayne State University. All other state institutions which may grant bachelor's degrees have been given a substantially equivalent form of government. Their governing boards have the same rights and powers as the boards of the Big Three except that instead of being elected by the people of the state, their members are appointed by the Governor with the consent of the senate. Practically speaking, popular election of such a large number of officials is not a possible alternative.

The new constitution also creates a new eight-member state board of education. The old four-member board which had controlled four state universities created by legislative acts and formerly known as Normal schools was abolished. Along with other duties, the new board is made "the general planning and coordinating body for all public education, including higher education." (Article 8, Section 3.) The board is also instructed to "advise the legislature as to the financial requirements" of public education. However, the last sentence of the section makes clear that the functions of the new board were not meant to restrict the independence of the autonomous universities. "The power of the boards of institutions of higher education provided in this constitution to supervise their respective institutions and

direct the expenditure of the institutions' funds shall not be limited by this section."

Three other significant, though relatively minor, changes were made in the new constitution which affect the universities. Section 4 of Article 8 requires that formal sessions of the governing boards be open to the public. The same section requires that an annual accounting of all income and expenditures by each educational institution be given to the legislature. Finally, the composition of the governing boards of the major state universities is changed by dropping the Superintendent of Public Instruction from *ex officio* membership.

MICHIGAN CONSTITUTION (1963) Article VIII. Education.

* * *

Sec. 3. Leadership and general supervision over all public education, including adult education and instructional programs in state institutions, except as to institutions of higher education granting baccalaureate degrees, is vested in a state board of education. It shall serve as the general planning and coordinating body for all public education, including higher education, and shall advise the legislature as to the financial requirements in connection therewith.

The state board of education shall appoint a superintendent of public instruction whose term of office shall be determined by the board. He shall be the chairman of the board without the right to vote, and shall be responsible for the execution of its policies. He shall be the principal executive officer of a state department of education which shall have powers and duties provided by law.

The state board of education shall consist of eight members who shall be nominated by party conventions and elected at large for terms of eight years as prescribed by law. The governor shall fill any vacancy by appointment for the unexpired term. The governor shall be ex-officio a member of the state board of education without the right to vote.

The power of the boards of institutions of higher education provided in this constitution to supervise their respective institutions and control and direct the expenditure of the institutions' funds shall not be limited by this section.

Sec. 4. The legislature shall appropriate moneys to maintain the University of Michigan, Michigan State University, Wayne State University, Eastern Michigan University, Michigan College of Science

and Technology, Central Michigan University, Northern Michigan University, Western Michigan University, Ferris Institute, Grand Valley State College, by whatever names such institutions may hereafter be known, and other institutions of higher education established by law. The legislature shall be given an annual accounting of all income and expenditures by each of these educational institutions. Formal sessions of governing boards of such institutions shall be open to the public.

Sec. 5. The regents of the University of Michigan and their successors in office shall constitute a body corporate known as the Regents of the University of Michigan; the trustees of Michigan State University and their successors in office shall constitute a body corporate known as the Board of Trustees of Michigan State University; the governors of Wayne State University and their successors in office shall constitute a body corporate known as the Board of Governors of Wayne State University. Each board shall have general supervision of its institution and the control and direction of all expenditures from the institution's funds. Each board shall, as often as necessary, elect a president of the institution under its supervision. He shall be the principal executive officer of the institution, be ex-officio a member of the board without the right to vote and preside at meetings of the board. The board of each institution shall consist of eight members who shall hold office for terms of eight years and who shall be elected as provided by law. The governor shall fill board vacancies by appointment. Each appointee shall hold office until a successor has been nominated and elected as provided by law.

Sec. 6. Other institutions of higher education established by law having authority to grant baccalaureate degrees shall each be governed by a board of control which shall be a body corporate. The board shall have general supervision of the institution and the control and direction of all expenditures from the institution's funds. It shall, as often as necessary, elect a president of the institution under its supervision. He shall be the principal executive officer of the institution and be ex-officio a member of the board without the right to vote. The board may elect one of its members or may designate the president, to preside at board meetings. Each board of control shall consist of eight members who shall hold office for terms of eight years, not more than two of which shall expire in the same year, and who shall be appointed by the governor by and with the advice and consent of the senate. Vacancies shall be filled in like manner.

3. *THE REGENTS OF THE UNIVERSITY OF MICHIGAN v. THE BOARD OF EDUCATION OF THE CITY OF DETROIT*

The Supreme Court of Michigan; 4 Mich. 213, 221-29 (1856)

GREEN, J.

* * *

[W]e conclude . . . that the Governor and Judges had power to execute the deed. This power was assumed to have existed, and does not appear to have been questioned, in the case of Scott *vs.* the Detroit Young Men's Society's Lessee. (1 *Doug. Mich. R.*, 119.)

2. Are the plaintiffs the "successors" of the grantees named in the deed?

The consideration of this question requires a somewhat extended examination of the Territorial and State legislation in regard to the University of Michigan. The first Act for the establishment of such an institution, was made and adopted by the Governor and Judges of the Territory, on the 26th of August, 1817, and was entitled, "An Act to establish the Catholepistemiad, or University of Michigan." This law provided for the appointment of a President, and the creation of thirteen didaxia, or Professorships; and the President and didactors, or Professors, were invested with power to regulate all the concerns of the institution, and to enact laws for that purpose; to sue, and to be sued; to acquire, hold, and alien property, real, mixed and personal; to make, use, and alter a seal; to establish Colleges, Academies, Schools, Libraries, Museums, Atheneums, Botanic gardens, Laboratories, and other useful literary and scientific institutions, consonant to the laws of the United States, and of Michigan; and to appoint officers, instructors, and instructii, in, among and throughout the various counties, cities, towns, townships, and other geographical divisions of Michigan. Their name and style as a corporation, was to be "The Catholepistemiad, or University of Michigan," and the great institution whose affairs were thus confided to the management of this magnificent legal entity, was to bear the same classical name. The didactors, or Professors, were to be appointed and *commissioned* by the Governor, and were to receive from the public Treasury an annual salary, to be from time to time ascertained by law. The funds for supporting the University were to be derived from taxes and other public sources, and the Treasurer was required to keep a separate account of the University fund. (*Shearman's System of Pub. Inst.*, p. 4.)

The principal features of this Act, which demand notice as connected with the question involved in this case, are its comprehensiveness as indicated by its style, the broad scope of its objects, and that it was to be supported by a public fund; all showing that it was intended to be a great public institution, embracing the whole Territory, and such an one as would not admit of the existence of any other, similar in its character and purposes. Whether any organization was ever had of the Corporation thus provided for, does not very distinctly appear, and the Act itself was repealed by a law adopted April 30, 1821, entitled, "An Act for the establishment of a University." See Code of Laws compiled in 1827, page 448.

By this latter Act certain persons therein named were created a body politic and corporate, by the name, style, and title of the "Trustees of the University of Michigan," and as such they, and their successors to be appointed by the Legislature, were made capable of suing and being sued, holding property, real, personal and mixed, and of buying and selling and otherwise lawfully disposing of property.

They were authorized to establish such Colleges, Academies and schools, depending upon the said University, as they might think proper, and as the friends of the Corporation would permit; and to apply such parts of their estate and funds in such a manner as they might think most conducive to the promotion of literature, and the advancement of useful knowledge within the Territory; and to elect a President of the University, who should be, *ex officio,* a member of such Corporation. This institution was to be established in the City of Detroit, and to this Corporation was committed the control and management of the township of land which had been granted to Michigan by Congress, for the use of a Seminary of learning, and the three sections granted to the College of Detroit, by the treaty of Fort Meigs, concluded September 29th, 1817, were vested in the said Trustees, subject to the uses, trusts and purposes for which the same were granted. All the property, rights and credits belonging to the Corporation, established by the Act of the 26th of August, 1817, were vested in the new Corporation, subject to the uses, trusts and purposes for which the same property was granted, given, conveyed or promised.

By Section 9, it is provided that this law or any part thereof may be repealed or modified by the Legislative power, provided that such power of repeal should not extend to divert to any other purpose than those expressed in the grant thereof to the Corporation, any property granted to them. To this Corporation was the land in question conveyed by the Governor and Judges "to the use of the University of Michigan."

No institution corresponding to the idea of a University, as contemplated by the Acts above mentioned, having been organized, the State Legislature in 1837 passed an Act entitled, "An Act to provide for the organization and government of the University of Michigan." (*Laws of* 1837, p. 102.) This Act provided that there should be established in this State an institution under the name and style of "The University of Michigan;" that the objects of the University should be to provide the inhabitants of the State with the means of acquiring a thorough knowledge of the various branches of literature, science and the arts; and that its government should be vested in a Board of Regents, who, with their successors in office, were to constitute a body corporate, with the name and title of the Regents of the University of Michigan. This act, without material modification, was incorporated into and re-enacted in the Revised Statutes of 1838 (p. 234, etc.), and also in the Revised Statutes of 1846 (p. 216, etc.). Under its provisions "The University of Michigan" was established and went into operation; and the same institution, under the supervision and management of the present Board of Regents, continues to exist, and is successfully accomplishing the great objects of its creation. The new Constitution, after providing for the election of Regents and the University, declares that the Regents thus elected shall constitute the Board of Regents for the University of Michigan, and that they, and their successors in office, shall constitute the body corporate, known by the name and title of "The Regents of the University of Michigan," and as such they have committed to them "the general supervision of the University, and the direction and control of all expenditures from the University Interest Fund."

That fund embraces the interest upon all moneys arising from the sale or disposition of the lands which have been granted by Congress for the support of a University, College or Seminary of learning in the Territory or State of Michigan, or acquired from any other source for the like purpose.

That the Corporation having charge of the University, since the organization of the Board of Regents, under the law of 1837, is a public Corporation, created for public purposes alone, cannot be doubted.

The institution was erected and has been supported by a public fund, and the Corporators have no private interest whatever, connected with their corporate character. (*Trustees, etc.*, vs. *Winston*, 5 *Stew. & Port.*, 17; *Dartmouth Coll.* vs. *Woodward*, 4 *Wheat. R.*, 629, 660, *et seq.*) But it is insisted, that "the Trustees of the University of Michigan," to whom the land in question was granted, was a private Corporation, and that their charter constituted a contract between the Legislature and the Corporators, which the Legislature could not

abrogate without the consent of the Corporation. To this it may be replied, that the Act of 1821, creating that Corporation, expressly reserves to the Legislature the power to repeal or modify it. This is a part of the contract itself, if the Act is to be regarded as a contract, and this, as well as every other provision of the charters received the assent of the Corporators when they accepted it. If not strictly a public Corporation, it partook largely of that character. The Trustees were to continue in place during the pleasure of the Legislature only, and all the vacancies were to be supplied by the Legislature. It did not, therefore, possess within itself the power of perpetuating its existence. It might at any time have been dissolved by the removal of the several Trustees, and the omission by the Legislature to appoint their successors. A large amount of public property was devoted to the support of the institution; but the Trustees were also made capable of holding property, real, personal and mixed: and of buying and selling, or otherwise lawfully disposing of property. Assuming, therefore, that they were a private Corporation in a legal sense, it became necessary to inquire whether their charter was repealed or modified by the Act of 1837, and if so, what was the effect of such repeal or modification, in reference to the property in controversy in this suit. In order to determine this question, we must first consider whether the Legislature of 1837 intended to create another and distinct institution from that contemplated by the Act of 1821, or to organize and put in operation the same. An examination of all the legislation relating to a University in Michigan, leaves no doubt upon this question. In every Act it is styled the "University of Michigan," and its objects are the same in all, though expressed in different language. Each of them appropriated all the public property at the disposal of the Legislature, which had been donated or set apart for the support of such an institution, to its support. Its name imports the existence of but one, and it seems clear that the Legislature had in view the establishment of but one. The Act of 1837, which created a Board of Regents for the government of the University, by its own force removed the then existing Trustees, and substituted in their place other Trustees by the name of "The Regents of the University," as their successors in office.

It is true, that the Act of 1837 makes no express reference to that of 1821, but it legislates upon *the same subject,* and the quotation of the words, "University of Michigan," in its title, is not without some significance, if it were otherwise doubtful, as indicating *what* institution was intended to be organized in pursuance of its provisions.

The fact that the location of the University was fixed by the law of 1821 at Detroit, and that by subsequent legislation it was

changed to Ann Arbor, affords no ground of argument against this conclusion. This, and the other changes which were made in the details of its organization, were modifications of the former law of such a character as the Act itself authorized. No injustice is thereby done to the original Corporators, or their successors, for, as we have already seen, they continued in place only during the pleasure of the Legislature, and were severally subject to removal at any time; and upon such removal, any rights or interests which they might have claimed in connection with the Corporation must have terminated. The Corporation was created for the purpose of administering a great public trust, and the present plaintiffs are but Trustees for the same great purpose, and are as truly the lawful successors of the original Corporation as if they had been appointed by the Legislature under the Act of 1821.

The lands in controversy are not diverted from the use declared by the grant, but are still devoted to the same identical purpose. They were conveyed for the use, etc., of "The University of Michigan," and from that use they have not been, and cannot be diverted. The grant must be presumed to have been made with a full knowledge of the power reserved to the Legislature, either to modify or repeal the charter by which the Trustees of the University existed, and it was made in such a manner as to secure the application of the property to the object for which it was granted, without particular regard to the person or persons who should execute the trust.

On the argument of this cause, the counsel for the defendants read a very able and elaborate report from a Committee of the Regents to the board, in March, 1838, in pursuance of a resolution adopted in November, 1837, requiring such Committee "to take into consideration the legal rights of the Trustees of the University of Michigan, and how far it is practicable to alter, by Legislative enactment, the organization of that board, so as to constitute the Board of Regents of the University of Michigan the Trustees of the University of Michigan. After discussing the various questions supposed to be involved, this report brings to our notice an important fact. After showing a non-user of their franchises for a long period, and deducing certain conclusions therefrom, it states that, "so satisfied are the Trustees of the old board of the absolute dissolution of the Corporation, that, by a Committee of their body, they have placed upon the journal of the Board of Regents, and the books of the Treasurer of that board, their surrender of the proceeds of the land mentioned in the eighth section of their charter; and also yielded up the control and occupancy of the real estate in the City of Detroit. This shows that the Trustees practically gave the same construction to the Act of 1837 which we have given to it. They regarded their own powers

as ended, and the Regents of the University as their successors, and as such, entitled to the possession and control of all the effects remaining in their hands for the use of the University. They did not doubt that the institution which was to be organized under the last mentioned Act, was the same which was contemplated by the Act which gave them a corporate existence; and they seem to have acquiesced, without hesitation, in that legislation which modified their charter, and provided for the appointment of their successors; and it is not improbable that this view of the legislation referred to was finally adopted by those who were immediately concerned in the question involved; for we did not learn that any active measures were ever taken in pursuance of the recommendations of the Committee, in order to place the Regents in the full and rightful possession of the corporate property.

But it is claimed on behalf of the defendants, that if the old Corporation has been dissolved by a repeal or modification of its charter, pursuant to the provisions of the ninth section, the lands reverted to the grantors, and were vested in the Mayor, etc., of the City of Detroit, by the supplementary Act of Congress of the 29th of August, 1842. If the views which we have already expressed be correct, and the plaintiffs are the lawful successors of the grantees, they are the persons indicated in the grant as Trustees of the property, and there can be no reversion until the *cestui que trust,* or beneficial object of the grant, shall cease to exist in contemplation of law.

Another point was made by the counsel for the defendants, which we do not now deem it necessary to discuss at length. It is assumed that the Legislative Council of the late Territory of Michigan had no power to create such a Corporation, and that the grant to the Trustees, etc., was void. The decision of this question in the case of the Bank of Michigan *vs.* Williams, 5 Wend. R., 478, and 7 *Ib.,* 539, has been affirmed by this Court, and must be regarded as settled. (*Detroit Young Men's Society's Lessee* vs. *Scott,* 1 *Doug. Mich. R.,* 119; *Swan* vs. *Williams, 2 Mich. R.,* 427.)

It must be certified to the Circuit Court for the County of Wayne, as the opinion of this Court, that the plaintiffs are entitled to recover the premises in controversy in this suit.

Present and concurring, COPELAND, PRATT, BACON, WING, JOHNSON and MARTIN, J. J.

DOUGLASS, J., dissented.

CHAPTER II

HOMEOPATHY AND THE JUDICIAL INTERPRETATION OF THE 1850 CONSTITUTION

1. INTRODUCTION

The Michigan Constitution of 1850 established an independent corporation to govern the University thus protecting the University from political control by the legislature. Only five years after the adoption of that new constitution, however, the legislature enacted a law requiring the Board of Regents to appoint a professor of homeopathy in the Department of Medicine.

The background of this new statute was as follows: At that time, the medical profession was divided into two factions. The smaller group of physicians adhered to the theories of "homeopathy," which, in general postulated that the sick should be treated with medicines which, if administered to a normal healthy person, would produce symptoms similar to those of the patient being treated. These theories of homeopathy were somewhat disdainfully rejected by the orthodox doctors of the day—the "allopaths," and there was much hard feeling between the two groups.

As it happened, the orthodox allopaths were already fully established on the faculty of the University's Medical Department, and, since even in that age, the Board of Regents was highly unlikely to make a new faculty appointment which would disrupt the present faculty, the homeopaths turned to the legislature for their support. And they obtained it. A long series of court cases ensued which, finally, resulted in the judicial recognition of the constitutional autonomy of the University.

The first case was an action by a private citizen, one Drake, in the original jurisdiction of the Supreme Court for a writ of mandamus. He sought mandamus to compel the Board of Regents to appoint the professor prescribed by statute. The

court denied the writ, giving two reasons: (1) Such an extraordinary remedy as mandamus to the Regents could be sought only by the Attorney General of the state, not by a private citizen with no special rights involved in the case. (2) Even if the statute were valid (and the court seemed to have grave doubts), it had only been in effect for one year and the Regents were apparently using their best efforts to find a candidate suitably qualified for the professorship. Thus, the action was premature.

Twelve years later the court decided the next case in this series. Procedurally, this case is the reverse of the *Drake* case. This time the Board of Regents applied for mandamus against the Auditor General. The state legislature had passed its first appropriation for the University, which formerly was supported almost solely by the proceeds of a federal land grant; but the Auditor General had refused to release the money because he thought that the University had not complied with the conditions contained in the appropriation act—namely, that the Regents obey the provisions of the 1855 legislation and appoint the professor of homeopathy. The Regents claimed that they had appointed such a professor, and the facts of the case were that they had, by resolution, established a School of Homeopathy to be legally within the Department of Medicine but physically outside Ann Arbor. The exact location not being specified in the resolution. They then appointed a professor to teach at this school and drew a warrant on the Auditor General for his salary under the appropriations act.

With this set of facts, the four-man court was split on the issue as to whether the Regents had complied with the intent of the legislature. Two justices said "no," one said "yes," and the fourth was silent. The result was that the Regents were denied the writ.

In the next two cases in 1869 and 1874, the Attorney General applied for mandamus to force the appointment of the professor by the Regents, but, in both cases, the court was still evenly divided resulting in denial of the writ.

The issues were finally resolved in the *Sterling* case in which the authority of the Board of Regents was finally vindicated. By the time of the *Weinberg* case the legislature and the University had accommodated each other so that in return for increasing state appropriations, a separate Homeopathic Medical College

had been established on the Ann Arbor campus. This time, however, the legislature changed its mind, and enacted new legislation requiring the relocation of the Homeopathic College in Detroit. Again a private citizen brought suit, and again the Supreme Court decided that only the Attorney General could institute such an action. Like the *Drake* case, however, *Sterling* is not limited to procedural formalities. The court, without a single dissent, went on to decide that under the constitution, the legislature had no authority to meddle with the University. The language of this case is often cited for the proposition that the Board of Regents, deriving its power from the same constitution as the three principal branches of government, is a fourth coordinate branch of state government equal in dignity to the legislative, executive, and judicial. Dean Stason in his article quoted in Chapter I considered talk of the fourth branch of government to be exaggerated. In any event, the Regents won the *Sterling* case.

The history of homeopathy at Michigan was concluded in 1925 when the Regents with the consent of the legislature, which deleted the requirement of maintaining the Homeopathic College from the appropriation acts, disbanded the college.

2. JUDICIAL DECISIONS

The People ex rel. Drake v. The Regents of the University of Michigan

4 Mich. 98, 99-100, 101-06 (1856)

> This was an application by the relator, who was a private citizen of this state, for an alternative *mandamus* against the regents of the university of Michigan, founded upon his affidavit, which set forth that he was a citizen of this state; that there was, at the time of filing his affidavit, no professor of homeopathy in the department of medicine of the university; that the regents, whose duty it was, had not only neglected and refused (although often requested thereto) to elect such professor, but still neglected and refused so to do.
>
> The law, upon which the application was founded (*Sess. L.* 1856, *p.* 234), provides "that the regents shall have power to enact

ordinances, by-laws, and regulations for the government of the university, to elect a president; to fix, increase and reduce the regular number of professors, and tutors, and to appoint the same, and to determine the amount of their salaries; provided there shall always be at least one professor of homeopathy in the department of medicine."

At the time the affidavit was filed, and the court moved for an alternative *mandamus,* doubts were expressed by some of the judges whether the court was empowered to grant the application upon such a showing, in such a case. The court, however, yielded to the application, upon the suggestion, to which the counsel for the relator assented, that all questions might be reserved to the coming in of the answer of the respondents. The alternative writ was thereupon issued, which was returned with the answer of respondents thereto annexed, in which, before proceeding to answer the merits of the allegations contained in the writ and the relator's affidavit, they excepted: 1. To the right of *the relator to move for the action of the court in the [100] premises; 2. To the sufficiency of the showing of the relator; and, 3. To the jurisdiction of the court to interfere with the action of the respondents in the exercise of their constitutional discretion in the supervision of the university, and in the direction and control of expenditures from the university interest fund; all which exceptions they claimed and insisted upon in law. The return also sets forth that, while not admitting the right of the legislature to interfere, the regents, out of respect to their expressed wishes, appointed a committee in March, 1855, to take the subject into consideration, and correspond with the various institutions in Europe and America, to ascertain the feasibility of uniting such a professorship with the existing college, and how, if feasible, it could best be done, and where the best man could be found, and that the committee had not concluded their labors; that from the antagonism between the systems they could not act wisely in the matter, if they were bound to act at all, without full deliberation. To this return the relator demurred.

* * *

By the court, WING, J.:

The first objection is predicated upon the alleged incapacity of an individual citizen, who is only interested in common with all other citizens of the state in the subject matter of *com- [102] plaint, to institute a proceeding of this kind against a public corporation, sustaining the relations which the university of Michigan does to this state.

It is alleged that where there is a cause of complaint against a public body or corporation, it is the duty of the attorney-general of the state to move against them, and that it would be peculiarly fit, in a matter of complaint of so grave a character as that presented by the affidavit of the relator, that it should be presented by, or be under the control and sanction of that officer, whose duty is to act in all such cases. To this it is answered by the counsel of the relator, in substance, that though true it is, the matter in question is one that interests the citizens generally, yet the right of every citizen of the state to move in the proper courts in a matter in which the citizens at large are concerned, and in respect to which there is ground of complaint against a public body or officers of this state, that they have neglected the performance of some duty imposed upon them by law, is fully sustained both by principle and authority.

Upon examination of the authorities cited by the counsel of the respective parties, we find no case decided by the English courts which sanctions this action of their courts on an application of this character, upon the sole motion of a private citizen of the realm. From this it is, we think, to be inferred that the practice was never sanctioned by their courts.

On looking into the American authorities cited, we find that the Supreme Court of New York have taken the broad ground, in the case of *The People v. Collier,* 19 *Wend.*, 64, and in 1 *Denio,* 618, that in all cases requiring redress, and involving a matter in which the interests of the public at large are concerned, and in respect to which a *mandamus* is the proper remedy, it is competent for their courts to act upon the relation and motion of a private citizen of the state.

The doctrine of those cases was approved and followed by the [103] *Supreme Court of Illinois, in the case of the County of Pike v. The State, 11 Illinois, Rep., 202*. These are the only cases to which we have been cited, or which have fallen under our observation, which sanction the right claimed by the relator in this case.

To these authorities, as we have said, are opposed the fact that the English courts, which have molded and formed the common law, transmitted it to us, and which governs both them and us, have not sustained a course of proceeding like this. The courts of Maine, Massachusetts and Pennsylvania have maintained a doctrine on this subject opposed to the New York and Illinois cases, and have held that, to entitle an individual citizen to be heard as a relator and on his own motion, he must show that he has some individual interest in the subject matter of complaint which is not common to all the citizens of the state; and whilst we do not intend to say that a case may not arise in which this court would allow an individual to file such a complaint, particularly if the attorney-general or prosecuting attorney

(as the case may be) were absent, or refused to act without good cause, we nevertheless express our conviction that this is a case in which the action of the attorney-general would have been proper and necessary.

The views we have expressed would seem to make it unnecessary to decide the other questions presented, particularly the constitutional question, but we have thought it would be proper to pass upon the questions presented by the answer and demurrer. We will, therefore, proceed to an examination of the answer. The facts being admitted, their sufficiency in law to defeat this proceeding is alone to be considered.

The respondents state their belief that the law requiring them to appoint a homeopathic professor in the medical department of the university is unconstitutional. Yet, being desirous of treating with proper respect the expression of the legislative will in the section quoted, they did, on the 30th *March last, appoint a [104] committee to enter into correspondence with other universities in Europe and in this country, to determine the feasibility of establishing such a professorship, and the most eligible person to fill such a chair when established, and that the committee has been actually engaged ever since in conducting such correspondence, and in gathering information from all sources, and are still engaged diligently in the same work.

The respondents are constitutional officers, to whom are confided by the constitution (*art. xiii,* § 8) "the general supervision of the university, and the direction and control of all expenditures from the university interest fund." They are elected by the people. They come at short intervals fresh from the body of the people, and cannot be supposed to be influenced by sentiments not common to those they represent. To their judgment and discretion as a body is committed the supervision of the financial and all other interests of an institution in which all the people of this state have a very great interest. In the words of the law in question, they are required to enact ordinances, by-laws and regulations for the government of the university; to reduce and increase the regular number of professors, and to appoint the same, and to determine the amount of their salaries. To this body of men, possessing such powers, and upon whom such duties are incumbent, this proviso is directed. They had already provided professors for the medical department under a system which had been in successful operation many years, and they were required to introduce a new and, as they say, an antagonistic element into that department, which in their judgment was likely to clash with the system already established, and produce embarrassment to the board and the institution under their control not easily

to be surmounted, and which it required time and investigation to harmonize and adjust. They nevertheless entered upon the proper investigations, with a view to accomplish the duty devolved [105] upon *them by the law. They aver that in the month of March of last year, and before the law took effect, they entered upon the active discharge of duties which must precede the actual appointment of the new professors; and though we have not been able to discover in their answer, or in any visible result of their labors, any clear evidence of their activity and zeal in the prosecution of their duty, neither are we able clearly to perceive, under all the circumstances of the case, that there has been any unnecessary delay or lack of good faith in their proceedings. They aver that they have acted in good faith, but at the same time under the influence of much uncertainty as to the constitutionality of the law, and we are compelled to recognize in this question what might well suggest doubts of the binding force of the law, and occasion some hesitation in their action.

The relator suggests no pressing necessity for the immediate action of the board, neither does he show that the rights of any individual or class of persons is jeoparded or injuriously affected by the delay that has occurred in their action. All that is averred, or that can be inferred from the affidavit of the relator, is, that the board of regents have hitherto and unnecessarily neglected to obey the behests of the law, which is claimed to be binding upon them, and which demands a more speedy obedience to its requirements than has been yielded to it by the respondents. The real question is one of time. The respondents have not refused to act, but they have acted tardily, and, as the relator suggests, in bad faith, if at all. We, however, are of the opinion, upon a full view of all the facts presented for our consideration, and which are admitted by the relator, that the case made out is not one which would authorize the further action of this court at this time. We admit that a *mandamus,* though a prerogative writ, is demandable of right in a proper case, yet it is only to be granted by this court in the exercise of a sound legal discretion; and hence ought only to be invoked in cases *of [106] last necessity. This necessity we have been unable clearly to discover in this case. The board of regents have a sound discretion to exercise, and until it is made apparent that they seek to evade the law, by unnecessary and willful delays, the exercise of our discretionary power cannot be called into action.

Present, all the judges.

The People ex rel. The Regents of the University v. The Auditor General

17 Mich. 161, 165-75, 185-92 (1868)

CHRISTIANCY J.:

The controversy in this case grows out of the conflict between two hostile schools or theories of medicine, both claiming the public patronage and the aid of the public funds for their promulgation in the medical department of the university. The adherents of the allopathic theory, which is the oldest and most generally recognized, having obtained a legal recognition from the regents in the establishment of the medical department, have continued to keep the exclusive control of it to the present time; while the adherents of the opposite or homeopathic school, claiming equal rights in an institution supported alike by the common funds of the whole people, have been unable to obtain any recognition from the board of regents, or, up to this time, any aid from the public funds for teaching their theory of medicine in this public institution. Fortunately, the present case does not call upon us to determine the *merits of the [166] respective theories or systems about which the "doctors disagree."

But the question whether the homeopathic theory should be recognized and taught in the medical department of the university as well as the allopathic, and both thereby be placed upon substantially the same fair grounds of competition, and allowed to test by results their respective claims to popular patronage, has twice been presented to the legislature and deliberately considered and decided by them, so far as they have any power over the question, in a manner which can leave no reasonable doubt of their intention.

First, in 1855, when the act of 1851, for the government of the university, was amended by adding at the end of the fifth section the following words: "Provided that there shall always be at least one professor of homeopathy in the department of medicine;" so that the section, when amended, should read as follows: "The regents shall have power to enact ordinances, by-laws and regulations for the government of the university, to elect a president, to fix, increase and reduce the regular number of professors and tutors, and to appoint the same, and to determine the amount of their salaries: *Provided,* that there shall always be at least *one professor of homeopathy in the department of medicine*:" *Laws 1855, p. 232.* This act was approved February 12, 1855.

At the January term of the late Supreme Court for 1856, the regents not having complied with the injunction of this act, to appoint a "professor of homeopathy in the department of medicine," one Drake, a private citizen, moved the court for a *mandamus* to compel the regents to perform this duty. To this the regents, after some preliminary objections, answered in substance that, owing to the antagonism between the two systems of medicine, they could not act wisely upon the subject without full deliberation; that they had, in the previous March, appointed a committee to take [167] the subject into consideration, and correspond *with the various institutions in Europe and America to ascertain the feasibility of uniting such a professorship with the existing college, and how, if possible, it could best be done, and where the best man could be found, and that this committee had not concluded its labors.

To this the relator demurred. The majority of the court, after deciding that the proceedings for a *mandamus* could not be maintained at the instance of Drake, the relator (who showed no particular interest affected), without the action of the attorney-general or the prosecuting attorney—a decision which disposed of the case and left nothing for adjudication—nevertheless proceeded to give their opinion upon the question raised by the demurrer; and after intimating that they could not "discover in the answer of the regents, or in the visible result of their labors, any clear evidence of activity or zeal in the prosecution of this duty," they declare that they can not, on the other hand, clearly perceive, under all the circumstances of the case, that there had been any unnecessary delay or lack of good faith in their proceedings. They further remark that the regents "aver that they have acted in good faith, but, at the same time, under the influence of much uncertainty as to the constitutionality of the law," "and we are compelled (say the majority of the court) to recognize in this question what might well suggest doubts of the binding force of the law, and occasion some hesitation in their action."

This remark seems to have been understood, and was probably intended as the intimation of a doubt of the constitutional power of the legislature to control the action of the regents in the manner attempted in the act. Owing to the expression of this doubt, or to some other cause, we hear nothing more of any attempt on the part of the regents for more than eleven years to carry the act into effect. Whether their committee ever made a report we are not informed. But probably the regents would not claim to have been endeavoring in good faith to carry into *effect this statute for the [168] whole or any part of the eleven years succeeding; believing their duty to the university required them to disregard the act. After

that decision the probability is that no further effort was made to give it effect. And, owing probably to the same intimation of the court, no further attempt seems to have been made to compel their obedience by *mandamus*.

But during the session of 1867 an application was made to the legislature for a grant of further pecuniary aid to the university beyond the income of the university fund. This legislature, like that of 1855, still determined that students in the medical department should have the opportunity and the option of studying medicine, as well upon the homeopathic as the allopathic system, were not willing to grant the pecuniary aid asked, unless they could at the same time secure this object. And seeing that the regents had disregarded their wishes as expressed in the act of 1855, and perhaps doubting their power to control the action of the regents in this matter by direct legislative injunction, they determined to grant them further pecuniary aid upon the condition precedent, that the regents should first carry into effect the act of 1855, before any of the money to be raised for this purpose should be paid to them; thus avoiding all question of constitutional power. To accomplish this purpose, the act of March, 1867, imposing a tax of one-twentieth of a mill upon the dollar of all taxable property in the state, was made subject to the express proviso, "that the regents of the university shall carry into effect the law which provides that there shall always be at least one professor of homeopathy in the department of medicine; and appoint said professor at the same salary as the other professors in this department; and the state treasurer shall not pay to the treasurer of the board of regents any part or all of the above tax, until the regents shall have carried into effect this proviso."

[169] *Under this act of 1867 (even admitting the act of 1855 not to have been obligatory upon the regents), it was for the regents to elect whether they would comply in good faith with the act of 1855, and this proviso in the act of 1867, according to the true intent and understanding of the legislature, or forego all advantages of this appropriation, which was only made them on this express condition.

The regents claim thus to have complied with this condition by the adoption, on the 25th of March last, of the following resolutions:

"*Resolved*, That the board of regents accepts the aid proffered by the legislature of Michigan, by the act approved March 15, 1867, with the terms and conditions thereof.

"*Resolved*, That in order to comply with the conditions imposed by said act, there be organized in the department of medicine

a school, to be called the "Michigan school of homeopathy," to be located at such place (suitable in the opinion of the board of regents), other than Ann Arbor, in the state of Michigan, as shall pledge to the board of regents, by June 20th, next, the greatest amount for the buildings and said endowment of school.

"*Resolved,* That two professors be appointed for said school, one at this time, and another prior to the opening of said school, and others as may be necessary.

"*Resolved,* That the sum of $3,000 be appropriated, besides the salaries of the professors, out of the state tax, so donated to the university, to be expended in establishing said school of homeopathy.

"*Resolved,* That Dr. Chas. J. Hempel be appointed professor of the theory and practice of homeopathic medicine in the Michigan school of homeopathy, at the salary of $1,000 per annum, from this date, to be paid out of said fund so donated."

Claiming that these resolutions constitute a full performance of the condition of the appropriation, the regents, by their treasurer, have applied to the auditor-general for his warrant upon the state treasurer for the money, or a part of it, raised by the act of 1867. The auditor-general, not satisfied that this action constitutes a performance of the condition, has refused his warrant, and the regents now move for a *mandamus,* to compel him to issue it.

*Whether this action of the regents constitutes a full [170] performance of the condition of the appropriation, is the only question necessary to the decision of this case.

The power of the regents, independent of these acts of 1855 and 1867, to establish such a professorship in the medical department at Ann Arbor, where that department has from the first been established, and was in successful operation at the time of these acts, is not denied. On the other hand, the regents do not claim the power of establishing this, or any other professorship, as a part of the university, at any other place, from either of these acts. But they claim that, under the general powers of supervision and control of the university, by the constitution and the act of 1851, they have the right to establish professorships, as a part of any department of the university, as well at any other place as at Ann Arbor; and hence that they are at liberty, under these acts of 1855 and 1867, to establish this particular professorship elsewhere, and that this will constitute performance of the condition upon which this appropriation was granted.

While I do not concur in this view, but hold that the university having been located at Ann Arbor by the act of 1837 (*Sess. L., p. 102*), however desirable it may be to establish a department or

professorship elsewhere, a legislative permission to that effect must first be obtained (see *Underwood v. Waldron, 12 Mich., 73; People v. Trustees of Geneva College, 5 Wend., 211; People v. Oakland County Bank, 1 Doug. Mich., 282; Comp. L.,* § *2192*), though, doubtless, the regents may perform their functions anywhere in the state, and all the powers of the several faculties are not necessarily confined to that locality, yet I do not, for the purposes of this case, consider it necessary to discuss this question of power in any way, and shall, therefore, proceed to consider the question now before us, upon the assumed hypothesis that the regents, independent of these acts, had, prior to, and at the time of, their passage, an im- [171] plied power to establish *professorships elsewhere than at Ann Arbor; and I proceed to inquire whether, upon this admission, these resolutions of the regents, looking to the establishment of a Michigan school of homeopathy, at some place not *yet determined upon,* other than Ann Arbor, constitutes a performance of the condition which the legislature intended to impose by the adoption of the proviso.

It is essential to the fair understanding of this question to bear in mind the circumstances under which the acts containing the condition was passed.

It must be recollected that at the time of the passage of both these acts of 1855 and 1867, the university, with all its departments and professorships, its buildings, libraries, cabinets, laboratories, apparatus, and all the other conveniences and property of the institution, had been for years existing, in fact, upon the university grounds at Ann Arbor; where the medical department and that of literature, science and the arts had already, in 1855, been for years in successful operation, and that these and the law department were all in still more successful operation at the same place in 1867; that the university as a whole, had been by law located there for thirty years, and that none of the departments or professorships had, from its first establishment there, ever been located elsewhere. We must also recollect that large and commodious buildings had for some years been erected upon the university grounds, at the same place, for the special use of, and occupied by the department of medicine; that in these buildings had been provided, at large public expense, such apparatus, furniture and conveniences as are essential to their use, in the attainment of an education in the medical profession in all its branches. We must also bear in mind that in the acquisition of the scientific knowledge necessary alike to the profession under both theories of practice, the same preliminary studies are required, the same knowledge of all cognate sciences; that in most branches of the science of medicine itself—such as anatomy, *physiology, surgery, [172]

obstetrics, and even for the most part pathology—the course of instruction is the same, and the books and authorities the same; the two systems differing mainly in their theories of the principles upon which medicines are supposed to operate in the cure of diseases; that in fact four-fifths of the entire course of professional instruction are the same under both systems; and all the same apparatus, the anatomical demonstrations, and surgical operations, the same material, collections of specimens and other conveniences for instruction, and therefore, most of the same professorships and lectures are required alike by the students of each system.

Giving due weight to these considerations, which we must naturally suppose would operate upon the minds of legislators endowed with plain common sense; bearing in mind the history of the conflict between the two systems in the legislature and in court; the persistence with which the legislature adhered to their determination to secure instruction in homeopathy in the department of medicine—is it not most natural to infer that the legislature when they spoke of a "professor of homeopathy in the medical department," used the language in the ordinary popular sense, as intended to designate the medical department as it was already established and in operation at Ann Arbor, and that they intended such professorship to have a *real* and *actual* rather than a *merely metaphysical* and *purely nominal* connection with the department of medicine? Is it not reasonable to infer that they intended to give to the professorship of homeopathy the same essential advantages growing out of an immediate and real connection with the department of medicine, as already established, that were enjoyed by the other professorships in that department; that they intended to give to the students in that department, if they should so elect, an equal opportunity of studying the profession upon the homeopathic system, with the like substantial advantages [173] to be derived from the other professorships in *the department, and the other advantages incident to a direct and intimate connection with the department and with the university?

Would it not, in fact, border upon absurdity, to undertake to account for the solicitude and persistency of the legislature in this manner, if, after all, they only intended to secure the establishment of a single professorship (for this is all that is required), at some place other than Ann Arbor, having no real connection with the university or the department of medicine, and none of the advantages to be derived from such a connection—no aid from the other professors—when more than four-fifths of the studies essential even to the homeopathic physician could not be pursued with any advantage in such a separate school of homeopathy alone?

If this had been their purpose, why call upon the regents of the

university to help them accomplish it? For, upon this idea, the regents might almost as well be called upon to mingle in the affairs of a railroad corporation, or any other institution having no real or natural connection with the university.

The homeopathic theory constitutes but a small part of the study essential to the homeopathic physician. Did the legislature seek to confine all the students to the study of that theory *alone,* who should choose to study it at all? Was the purpose of this apparently careful and persistent course of legislation intended only as a solemn mockery—as a dismal practical joke?

It seems to me very evident that the legislature could not have contemplated a separate school of homeopathy alone; and yet it is equally clear that if, as the regents seem to suppose, they contemplated a separate school at all, they must have contemplated a school for the study of homeopathy alone; for they have no provision for giving instruction to such students in any other branch of *medical science, if the school is to be elsewhere [174] than in the medical department at Ann Arbor.

It will be conceded that the legislature contemplated a professorship in which students might actually receive instruction; they must therefore have contemplated a professorship which should have a potential existence *somewhere;* so established, at some place, as to be able to enter upon the practical business of giving instruction to students. But these resolutions establish no such professorship anywhere. At most they look only to the future and contingent establishment of a "Michigan school of homeopathy," at such place other than Ann Arbor, as in the opinion of the regents shall be suitable, and "as shall by the twentieth day of June (then) next, pledge to the board of regents the greatest amount for buildings and endowments for said school." Now, it does not appear that any place has yet pledged any sum for those purposes; and certainly it can not be conclusively presumed that any place will do so. Until this is done, it is not to be established at any place, or rather, in plain English, it is not till then to be established at all, even in these paper resolutions. I am therefore inclined to think the regents are at least premature in this application; and that, under any view that can be taken, they ought to have waited until this professorship should be established as a practical entity, capable of vital action.

Suppose a student wishes to resort to this "Michigan school of homeopathy" for instruction. Where will he find it? It is yet to be found only in the state at large, as much in one place as another; omnipresent except at Ann Arbor, but nowhere visible or palpable to the senses. Will he find it any the more readily by being told, in the language of this resolution, that it is "organized in the department

of medicine," not where the department is, but at some place not yet determined, outside of Ann Arbor? Can it be for a moment seriously contended that this was all that was contemplated by the legislature?

[175] *Have the legislature at two separate sessions been making all this ado about a professorship of homeopathy, for no other purpose than to enable such professor to draw a salary, without the performance of any duty?

These considerations, with many others which might be urged, produce upon my mind a very strong conviction that the legislature intended to require, by this condition, that the professorship of homeopathy should be established *practically*, and in fact *in* the medical department, where that department is already established and in operation, at Ann Arbor.

Upon the policy or impolicy of attempting to establish it there, I express no opinion. It is not a question for this court. Of the good faith of the regents, however, and their desire to act as may be best for the interest of the university, there can be no reason to doubt. But I think they have mistaken the true intent of the condition upon which this appropriation was made, and that they have mistaken in some measure their constitutional powers. The mere power of "supervision" given by the constitution, whether subject to, or independent of, legislative control, should not, I think, be confounded with the power to create or establish a university, or to change its location, in whole or in part, as previously fixed by the legislature and recognized by the constitution.

GRAVES J.:

* * *

When the application was made to this court, in 1856, to coerce compliance with the act of 1855, it was not intimated by, or on behalf of, the regents, or supposed by the court, in so far as appears in the report, that the last named act could be complied with, except by the establishment of the professorship at Ann Arbor; while, on the contrary, the regents took the ground which was expressly noticed in the opinion of the court, that the law required the introduction of a new and antagonistic element into the department of medicine likely to clash with the system already established, and produce embarrassment to the board and the institution not easily to be surmounted, and which it would require time and investigation to harmonize and adjust. Indeed, it is very plain that some of the objections

were based on the tacit admission that the proviso required the professorship to be at Ann Arbor.

It does not appear to have occurred to the regents or the court, that the whole difficulty could be surmounted, and the law, at the same time, complied with, by the simple expedient of establishing the new professorship at a distance from Ann Arbor; and it seems hardly possible to reconcile the views then expressed, with the supposition that those who expressed them did, at that time, imagine that the law could be thus executed. The court then said, "the real question is one of time," and no other place than Ann Arbor appears to have been thought of.

The controversy attracted much attention, and the general public and the legislature must naturally have inferred, from the ground of opposition on the part of the regents, *and the [186] opinion of the court, that the law of 1855 was believed and understood to require the establishment of the new professorship at the place where the institution and all its professorships were established, where were accumulated all the instruments of education, and where alone were to be found the buildings provided for the use of the college; and that the difficulty in the execution of the statute, in the view of the regents, consisted in its requiring that there should be brought together, in the same university, and at the same place, professors of opposing schools in the same department.

The facts which have been mentioned, and the opinion of the court, which has been in part quoted, must have been present to the legislature when the act of 1867 was passed. And when we consider the nature of these facts, and the tenor of this opinion, is it not probable that the legislature then supposed the regents understood the alleged offer as requiring the specified professorship to be at Ann Arbor?

Is it not probable that those who so persistently insisted upon the new professorship meant and apprehended that the regents understood that the professorships before established, and that sought to be established, should be placed on terms of substantial equality, in respect to all advantages and opportunities depending upon location, and the instrumentalities of education; and that all students should have access, at all times, to all the sources of knowledge which either school should supply? When we consider all the circumstances, including the representation of the regents in 1852, that all the faculties ought to be collected at Ann Arbor, is it clear that the legislature, in 1855, intended, or supposed they were understood as intending, that the new professorship should be established at a distance from that place, and apart from the facilities there provided, even though such action should result in giving superior advantages to the new school?

[187] *It seems to me that these questions will not admit of an answer favorable to the views of the petitioners. Notwithstanding that it was urged in 1856 that the new professorship, if introduced, would be an antagonistic element in the university, the legislature, in 1867, insisted upon compliance with the first act, without any qualification. The regents at the former time seem to have understood, and I think that the legislature was authorized to infer, that they understood that the act of 1855 required the professorship to be at Ann Arbor.

If the thought of another location was not present to the legislative mind, then the legislature could not have intended a location elsewhere, and if none was intended elsewhere, the design must have been that the professorship should be where the university, including the department of medicine, was situated, since a location at some place was inevitably involved in the statutory requirement.

Upon deliberate consideration I can discover nothing in the laws in question to indicate that any separation of professorships, in the department of medicine, was designed or thought of, but, on the contrary, the purpose appears to have been to supply a new element of instruction for the benefit of all who should attend the college as situated and established.

Whether the action of the legislature in this regard was wise or unwise, whether, if consummated, it would be likely to result in injury to the institution, is not our province to determine. The case is not one in which that question could be properly debated, if in any case it could be a proper topic for discussion in this court. The laws in question were enacted in due form; at all events that is not disputed, and the present application is based upon an alleged compliance with them, and not upon an excuse for non-compliance. That the eminent men to whom the people have confided the supervision of one of the noblest educational institutions of this or of any age, have faithfully *endeavored to execute their trust, I have [188] no doubt. But the question for our determination does not depend upon this consideration. We are asked by the petitioners to decide in substance that it is clear that they have accepted and acted upon the offer contained in the acts referred to in the same sense in which the legislature apprehended that the regents understood it, and such decision I can not concur in making.

The legislature required the establishment of the new professorship at some place; and it is not only not clear, but quite unlikely, that they meant, or that they supposed the regents understood them as meaning, that it should be at a point distant from the seat of the university and all its appointments.

I am, therefore, of opinion, upon the grounds stated, that the writ ought not to issue.

To avoid misapprehension, it is proper to say, that I am not prepared to admit that the regents have the power to establish a professorship at a place other than Ann Arbor, but as the disposition of the present case does not require us to decide that question, I forbear to discuss it.

CAMPBELL J.:

As a majority of the court have not been able to coincide in opinion upon the motion before us, I propose to indicate as briefly as I can the general views on which I think the relators are entitled to relief.

As the money in dispute is a mere offer to the regents of that which would not otherwise belong to them, of course the donors may affix conditions to it. And the condition they have affixed to this grant is that "there shall be at least one professor of homeopathy in the department of medicine." This is a plain and simple provision, and leaves but a single question open to decision, which is whether any portion of the department of medicine can be established at a place outside of Ann Arbor.

[189] *The university is divided into three departments, and those are extensive enough to include all branches of human inquiry relating to secular pursuits. There are in the collegiate department, and there may be in either of the others, many entirely different courses of study, which no student can pursue at the same time, and which may or may not occupy in part the same ground. In the various courses of instruction which are now, or which may be hereafter, devised for the teaching of specific arts or sciences, there must always be more or less divergence as students fit themselves for the laboratory, the forge, the mine, the farm, or other branches of business or professional pursuits. And it must always be left to the regents, as the only body which can lawfully carry on the administration of the university, to parcel out the studies as in their good judgment seems best. Any student who enters the university, and selects his course, must confine himself to that course as they have arranged it, and they must decide what pursuits can profitably be allowed to go on together.

If they should see fit to include in the medical department instruction in the theories and practice of any number of conflicting schools, or to provide courses for different special branches, as for dentistry, for diseases of the eye and ear, for nervous diseases, or for the treatment of insanity, it must be obvious that whether these should call for discordant teachings, or should merely require students

to follow select but harmonious courses, there must be some rule which would exclude one student from attempting to learn all at once. If he should attend one course, he must absent himself from others, and this must be regulated by the regents.

Whether students of one system could profitably attend at the same time the teachings of two conflicting schools, or whether the professors could be wisely or harmoniously amalgamated into one body, is not a judicial question, but one of administration, to be settled by the authorities of *the university; and if stu- [190] dents of homeopathy were to pursue their studies at Ann Arbor, we have, as a court, no means of knowing whether they could or would profitably avail themselves of the teachings now established there. Upon many branches of medical teaching it is very obvious that a lecturer must of necessity inculcate his views upon treatment and curative systems on which there would be radical differences. To what extent these differences would separate students under the various professorships, it is not for us to determine. But it is at least quite possible that there should be a general, if not an entire divergence. In other words, it is impossible for a court to assume that the location of a homeopathic professorship at Ann Arbor would be more desirable or profitable than elsewhere, or that the system could be introduced without an entire division of courses of lectures and other instruction. Such seems to be the conclusion of the regents, who upon this subject have all the responsibility of determination.

It can not be doubted that, where courses of study are different, there is no necessity for conducting them in the same place. And unless there is some rule of law which confines the entire operations of the university to a single place, there can be no objection to the course taken by the regents in this case.

The only reason given anywhere for denying their power is that under the law the university is located at Ann Arbor, and that any removal of its place, or any transaction of business away from its place, is unauthorized.

It is beyond dispute that where, by its charter, the business of a corporation is localized, it must be done in the place prescribed. Our own decisions are full on this subject. But it is just as well settled that where the business is not localized no such rule exists.

Thus, for example, we have many corporations where nothing is localized but the business offices. We have several mining [191] charters of this kind. Navigation companies *furnish another familiar instance. Insurance companies, companies for scientific and exploring purposes, and many others, might be readily suggested.

I think that the purposes expressed in the various provisions concerning the university, preclude the idea that all of its operations must be local. In its origin in 1817, it had no locality prescribed, and its functions were expected to be performed in many places. So when the modifying law of 1821 was passed, it was located in Detroit, but its functions were ubiquitous. While thus established, and after it had been directly recognized both by congress and the treaty-making power, its perpetuity was required by congress and stipulated for by the state upon its admission into the Union, and also fixed by the first state constitution.

When a new law was passed, in 1837, which provided for its location in Ann Arbor, the language used was no broader than that which had before located it in Detroit. And, while some of its functions were narrowed, it was expressly designed to cover the whole field of science, art and learning. Many branches of knowledge can be profitably taught only in favorable localities. It is not supposable that it was designed to prevent such teaching as should be profitable. Mining, surveying, geology and engineering require for their mastery some attendance, either temporary or permanent, at places where such work is being carried on. Medical teaching in its completeness avails itself of hospitals, and must in that case be partially given where hospitals are to be found. And when we consider that the university is expected to furnish complete teachings, we must read all the charter provisions together, and assume that the reference to locality is not designed to localize all its doings.

If the law of 1837 means any such thing, then it differs from the ordinary charters of which we have any account in the law books. It is the first law that ever fell under my own notice which confined a corporation not to a *municipality, but to a sin- [192] gle parcel of land, as it directs the buildings to be placed on a forty-acre lot, to be thereafter designated, and contains no other establishment of locality. If this law operates at all to confine the corporation, it can never carry on its operations off of the quadrangle. The observatory lot, and any other premises which its growing needs might require, would all be outside of its legally ordained locality.

It seems to me that the laws locating the university upon a specified tract of land, were not designed to localize all of its educational operations, but simply to make that the great center, as state buildings and county buildings, or corporation offices, are made centers for public or corporate purposes, while many functions may be performed elsewhere. Where the purposes of the university are so extensive as to require wider facilities for their complete fulfillment, I do not think such provisions require a construction which would

hamper them. And I think the regents in this case have not gone beyond the fair intent of the scheme of the university.

I think the writ should issue.

COOLEY CH. J. gave no opinion.

The People v. The Regents of the University

18 Mich. 469, 482-83 (1869)

GRAVES J.:

The attorney-general having applied for a *mandamus* to require the regents to appoint a professor of homeopathy in the department of medicine in the university, pursuant to section 2187 of the Complied Laws, and the usual order for showing cause against the motion having been made, the regents at the last January term made answer to the order, and alleged for cause against the application that the part of the section referred to, which provided there should always be at least one professor of homeopathy in the department of medicine, was repugnant to the provisions of article 13 of the constitution, which confers upon the regents the power of general supervision of the university. The question thus presented was ably argued by counsel, and we have considered it with an *earnest [483] desire to reach a decisive result. But in this we are disappointed by an equal division of opinion among the members of the court. As this circumstance would deprive our opinion of all force as judicial authority, we do not deem it expedient to superadd our reasonings to the elaborate arguments from the bar. It is seen that since the application cannot obtain the sanction of a majority of the court, the motion must fail.

The other justices concurred.

The People (on the relation of the Attorney-General) v. The Regents of the University

30 Mich. 473 (1874)

Application for *mandamus.*

This application was to require the respondents to appoint, install and maintain two professors of homeopathy in the department of medicine of the university, as provided by the act of 1873.—*Sess. L. 1873, p. 73.*

PER CURIAM.

The very able argument in this case has not brought any member of the court to any different views from those heretofore sufficiently expressed, and we therefore make no order.

Sterling v. The Regents of the University of Michigan

110 Mich. 369, 370-73, 374-76, 377-78, 379-84; 68 N.W. 253 (1896)

Mandamus by Charles F. Sterling to compel the Regents of the University of Michigan to comply with Act No. 257, Pub. Acts 1895, providing for the removal of the homeopathic medical college from Ann Arbor to Detroit. Submitted May 5, 1896. Denied July 28, 1896.

In 1895 the legislature passed Act No. 257, Pub. Acts 1895, the material part of which reads as follows:

"That the board of regents of the University of Michigan are hereby authorized and directed to establish a homeopathic medical college as a branch or department of said University, which shall be located in the city of Detroit, and the said board of regents are hereby authorized and directed to discontinue the existing homeopathic medical college now maintained in the city of Ann Arbor as a branch of said University, and to transfer the same to the city of Detroit."

The title of the act is "An act to amend section one of an act entitled 'An act for the establishment of a homeopathic medical department of the University of Michigan,' approved April 27, 1875, being section 4932 of Howell's Annotated Statutes." The regents of the University declined to comply with said act. The relator thereupon presented this petition for the writ of *mandamus* to compel the regents to comply with the act. The ground for such refusal is (1) that it was not, in their judgment, for the best interests of the University; (2) that the legislature has no constitutional right to interfere with

or dictate the management of the University. Among other things in their answer, they say:

"A large part of the course of instruction required to be given in the other medical department of the University, and in the homeopathic medical college, is common to the two schools. This fact has anabled the regents to provide for such common instruction at the expense, to that extent, of the support and maintenance of a single department; thus saving to the benefit of the University and to the people of the State a large sum of money annually, which otherwise would be required for the continuous support of two medical departments, which would be wholly separate throughout their several courses of instruction in case both departments of medicine were not located at the city of Ann Arbor. It appears to the regents that great advantage arises to the University as a whole, and to the students in the various departments of the University, that all the branches of the University are located and maintained at the proper seat of the University, at Ann Arbor. It appears also to the regents that whatever suggestions may be made of the advantages to be derived to the homeopathic medical college, as a department of the University, by the removal of such department to a larger city, or to any other locality than the city of Ann Arbor, are suggestions which may, perhaps, be used for the removal of the other medical department of the University and other departments of the University to some other locality than the city of Ann Arbor, by parties or interests desiring to secure such removal. It further appears to the regents that the removal of one of the established departments of the University suggests a movement for an entire change in that policy of concentration of the departments of the University at the proper seat of the University which has hitherto promoted the growth and advancement of the University to its present place among the great schools of the world.

"The claim which is made under the application of the relator, that the provisions of Act No. 257 command the discontinuance and removal of the homeopathic medical department of the University by the regents, without any reference to their power of supervision of the University, suggests to the regents the question whether such provisions do not curtail and impair the power of supervision and control of the University which has been vested in the regents by the Constitution of the State. It is the purpose, as well as the plain duty, of the regents, to exercise, according to their best judgment, the supervision and control of the University, which has been vested in them by the State Constitution, to promote both the interests of the University and the interests of the people of the State, which are

involved in the welfare of the University. The regents have not undertaken to decide for themselves upon the wisdom or unwisdom of the purpose of the provisions of said Act No. 257, under which the relator's application is made. They have been advised that grave doubts exist in respect to the validity of said act. They have also been advised that to the extent that the provisions of the act are a foundation for the application for a writ to compel action on the part of the regents, denying their right to exercise judgment, supervision, or control in relation to the subject of the discontinuance of an existing department of the University, there are grave doubts in respect to the validity of the act."

GRANT, J. *(after stating the facts).* 1. The petitioner does not in his petition show any interest in the matter, or the right to question the action of the board of regents. The attorney general is the proper party to move in such a case, and a private citizen does not possess the right, without permission of the court, to apply for this writ to compel a public board to perform an omitted duty. *People v. Regents of University of Michigan,* 4 Mich. 98. The petition in this case does not set forth that the petitioner is a citizen of the State, or that he is in any manner injured by the action of the board. This point is not raised in the briefs of counsel, probably because it is desired to obtain a decision upon the merits. We think that such proceedings should be instituted by proper parties, and that relators should show themselves competent to bring them into court. Inasmuch, however, as the question has not been raised, we shall do as we have sometimes done before,—dispose of the case upon the main issue.

* * *

Under the Constitution of 1835, the legislature had the entire control and management of the University and the University fund. They could appoint regents and professors, and establish departments. The University was not a success under this supervision by the legislature, and, as some of the members of the constitutional convention of 1850 said in their debates, "some of the denominational colleges had more students than did the University." Such was the condition of affairs when that convention met. It is apparent to any reader of the debates in this convention in regard to the constitutional provision for the University that they had in mind the idea of permanency of location, to place it beyond mere political influence, and to intrust it to those who should be directly responsible and amenable to the people. After these constitutional provisions,

substantially in their present form, had been presented to the convention, and the question arose as to how they should be selected, whether by election or appointment, Mr. Whipple said:

"If we select eight (and I should prefer twelve), your regents will be distributed over every part of the State, and the public will thus obtain a knowledge of this institution; *for the convention will observe that the concerns of this University are to be placed in the hands of the regents.* They will obtain very important knowledge in regard to this establishment, and the people among whom they live will become informed as to the nature of this institution, and will become interested in it." Convention Debates, 782.

The public men of those times were greatly interested in the University. Methods for its management were discussed by governors in their messages, by reports of the board of regents to the legislature, and by committees of the legislature. The general consensus of opinion was that it should be under the control and management of a permanent board, who should be responsible for its management. The regents, in March, 1840, in obedience to a joint resolution of the legislature, reported that—

"The first change in the organic law deemed essential is the *proper restriction of responsibility to the board of regents.* At present the responsibility is divided, and the board would be greatly facilitated in their action were such amendments made as would throw entire responsibility on them."

In the same report they also urged that the trust and management of the funds of the University should be placed in the regents.

A select committee was appointed by the legislature in 1840 to inquire into the condition of the University. No more forcible argument could well be made than is found in that report for placing the entire control of the University in the hands of a permanent board, and taking it away from the legislature. 2 House Documents 1840, p. 470. I quote from that report as follows:

[See pp. 6-8 for text of the report.]

* * *

All these reports and discussions were undoubtedly known to the members of the convention, and their action should be construed in the light of such knowledge. I am unable to find a single

utterance by any member of that convention from which it could be inferred that the members believed or supposed that they were leaving the control of that institution to the legislature. The result has proved their wisdom, for the University, which was before practically a failure, under the guidance of this constitutional body, known as the "Board of Regents," has grown to be one of the most successful, the most complete, and the best-known institutions of learning in the world. That such was the understanding of the meaning of the Constitution of 1850 is shown by the report of the superintendent of public instruction, published in 1852, in which he refers to "the additional and general interest created by a change of the organic law in 1850, in placing the University *under the control of regents elected by the people.*" Report, Pub. Ins. 1852, p. 26.

The provisions of the Constitution of 1850 in regard to the University are these (article 13):

[See pp. 10-11 for text of these constitutional provisions.]

* * *

The board of regents, elected under the new Constitution, immediately took control of the University, interpreted the Constitution in accordance with its plain provisions, denied the power of the legislature to interfere with its management or control, and for 46 years have declined obedience to any and every act of the legislature which they, upon mature reflection and consideration, have deemed against the best interests of the institution. This court has sustained them in that position, and has on every occasion when asked denied its writ to interfere with their action. In January, 1856, in the case of *People* v. *Regents of University of Michigan,* 4 Mich. 98, this court, in denying the writ of *mandamus* to compel the regents to establish a professorship authorized by the legislature, said:

"They [the regents] aver that they have acted in good faith, but at the same time under the influence of much uncertainty as to the constitutionality of the law, and we are compelled to recognize in this question what might well suggest doubt of the binding force of the law, and occasion some hesitation in their action."

Obviously, it was not the intention of the framers of the Constitution to take away from the people the government of this institution. On the contrary, they designed to, and did, provide for its management and control of a body of eight men elected by the people at large. They recognized the necessity that it should be in charge

of men elected for long terms, and whose sole official duty it should be to look after its interests, and who should have the opportunity to investigate its needs, and carefully deliberate and determine what things would best promote its usefulness for the benefit of the people. Some of the members of the convention of 1850 referred in the debates to two colleges (one in Virginia and the other in Massachusetts) which had been failures under the management by the State. It is obvious to every intelligent and reflecting mind that such an institution would be safer and more certain of permanent success in the control of such a body than in that of the legislature, composed of 132 members, elected every two years, many of whom would, of necessity, know but little of its needs, and would have little or no time to intelligently investigate and determine the policy essential for the success of a great university.

Now, in the face of the facts that the regents have for 46 years exercised such control, and openly asserted their exclusive right to do so; that the courts have refused to compel them to comply with the acts of the legislature; that this court held in *Weinberg* v. *Regents,* 97 Mich. 246, that they were a constitutional body, upon whom was conferred this exclusive control; and in the face of this plain constitutional provision,–this court is now asked to hold that the regents are mere ministerial officers, endowed with the sole powers to register the will of the legislature, and to supervise such branches and departments as any legislature may see fit to provide for. By the power claimed, the legislature may completely dismember the University, and remove every vestige of it from the city of Ann Arbor. It is no argument to say that there is no danger of such a result. The question is one of power, and who shall say that such a result may not follow? The legislature did once enact that there should be a branch of the University in every judicial circuit. If the regents comply with the present act, the next legislature may repeal it, and restore that department to the University at Ann Arbor, or place it elsewhere. Some legislatures have attached conditions–and they have the undoubted right to do so–to appropriations for the support of the University, and a subsequent legislature has removed the conditions. Some legislatures have attached to appropriations the condition for the establishment of a homeopathic professorship in the old medical department. Other legislatures have refused to attach any such condition. What permanency would there be in an institution thus subject to the caprice and will of every legislature? Under this power, the legislature could remove the law department from the University at Ann Arbor to Detroit, and provide that the law library, to which one citizen of Michigan has donated $20,000, should also be removed. It might scatter its great library (to the collection of

which private citizens have contributed nearly or quite one-half), and also its great museums, laboratories, and mechanical appliances. Other results will readily suggest themselves. It appears to us impossible that such a power was contemplated.

Furthermore, it renders nugatory the express provision of the Constitution that "the regents shall have the direction and control of all expenditures from the University interest fund." It is significant that, at the time of the adoption of the Constitution, this fund constituted the sole support of the University, aside from fees which might be received from students. The State had made no appropriations for its support, and there is nothing to indicate that any such appropriations were contemplated. It is unnecessary to argue that the above provision means what it says, and that it takes away from the legislature all control over the income from that fund. The power therein conferred would be without force or effect if the legislature could control these expenditures by dictating what departments of learning the regents shall establish, and in what places they shall be located. Neither does it need any argument to show that the power contended for would take away from the regents the control and direction of the expenditures from the fund. The power to control these expenditures cannot be exercised directly or indirectly by the legislature. It is vested in the board of regents in absolute and unqualified terms. This act, in express terms, prohibits the regents from using any of this fund to support a homeopathic department at the University at Ann Arbor, since it prohibits them from maintaining such a department there.

This power cannot be sustained without overruling the case of *Weinberg* v. *Regents.* The basis of the majority opinion in that case is that the board of regents is a constitutional body, charged by the Constitution with the entire control of that institution. The result could not have been reached upon any other basis. It was held not to be a State institution under the control and management of the legislature, as were the other corporations enumerated in the statute then under discussion. We there said: "Under the Constitution, the State cannot control the action of the regents. It cannot add to or take away from its property without the consent of the regents." We might with propriety rest our decision upon that case, and should be disposed to do so were it not for the urgent contention of the counsel on the part of the relator that that case does not apply. We are therefore constrained to state some further reasons to show that the legislature has no control over the University or the board of regents.

(1) The board of regents and the legislature derive their power from the same supreme authority, namely, the Constitution. In so far as the powers of each are defined by that instrument, limitations

are imposed, and a direct power conferred upon one necessarily excludes its existence in the other, in the absence of language showing the contrary intent. Neither the University nor the board of regents is mentioned in article 4, which defines the powers and duties of the legislature; nor in the article relating to the University and the board of regents is there any language which can be construed into conferring upon or reserving any control over that institution in the legislature. They are separate and distinct constitutional bodies, with the powers of the regents defined. By no rule of construction can it be held that either can encroach upon or exercise the powers conferred upon the other.

(2) The board of regents is the only corporation provided for in the Constitution whose powers are defined therein. In every other corporation provided for in the Constitution it is expressly provided that its powers shall be such as the legislature shall give. In the case of townships (article 11, § 2), and in counties (article 10 § 1), and boards of supervisors (article 10, § 6), it is expressly provided that each corporation shall have such powers and immunities as shall be prescribed by law. The same is true of other officers, aside from the regents, provided for in the Constitution. Justices of the peace (article 6, § 18), the sheriff, the county clerk, the county treasurer, the register of deeds, and prosecuting attorney (article 10, § 3), and township officers (article 11, § 1), can exercise such powers as shall be prescribed by law.

(3) Let us apply another test. It is a rule of construction that where a general power over one subject is conferred upon one body in one clause of an instrument, without any restricting or qualifying language, and the like power over another subject is conferred upon another body in another clause of the same instrument, with restricting or qualifying language, the restrictions or qualifications of the second clause cannot be read into the first clause. On the contrary, they must be excluded. By article 13 § 1, the superintendent of public instruction is clothed with "the general supervision of public instruction;" but it is added, "His duties shall be prescribed by law." By article 13, § 9, the board of education is given "the general supervision of the State Normal School;" but it is added, "Their duties shall be prescribed by law."

Thus, in every case except that of the regents, the Constitution carefully and expressly reposes in the legislature the power to legislate and to control and define the duties of those corporations and officers. Can it be held that the framers of the Constitution, and the people, in adopting it, had no purpose in conferring this power, viz., the "general supervision," upon the regents in the one instance, and in restricting it in the others? No other conclusion, in my

judgment, is possible than that the intention was to place this institution in the direct and exclusive control of the people themselves, through a constitutional body elected by them. As already shown, the maintenance of this power in the legislature would give to it the sole control and general supervision of the institution, and make the regents merely ministerial officers, with no other power than to carry into effect the general supervision which the legislature may see fit to exercise, or, in other words, to register its will. We do not think the Constitution can bear that construction.

The writ is denied.

LONG, C. J., MONTGOMERY and HOOKER, JJ., concurred with GRANT, J. MOORE, J., concurred in the result.

CHAPTER III

CONSTITUTIONAL AUTONOMY OF THE UNIVERSITY SINCE THE HOMEOPATHIC CASES

1. CASES INTERPRETING THE CONSTITUTIONAL SEPARATION OF UNIVERSITY AND STATE

The University's autonomy is based upon a clause of the state constitution granting the Board of Regents the "general supervision" of the University. Since 1908 and 1956 respectively, the governing boards of Michigan State University and Wayne State University have enjoyed a similar franchise. In the present state constitution, equal rights were given to all governing boards of state-assisted four-year institutions of higher learning granting baccalaureate degrees.

Judicial interpretation of the "general supervision" clause could not end with the homeopathic cases, for clearly there are limits to the independence of universities[1] from the rest of state government. While the "general supervision" clause grants the governing boards plenary power over all of the internal management and affairs of the universities, no one would argue that the universities are completely exempt from all the general legislation affecting the rest of the state. The universities are not independent city-states. There have, therefore, been recurring cases in which the courts are called upon to decide whether, in a particular situation, a statute applicable by its terms to a much larger group than the constitutional universities, is actually an unconstitutional interference in the internal affairs of the universities.

The other recurring problem is the validity of particular conditions on appropriations the legislature makes to the state universities. On the one hand, the constitution makes it the duty of the legislature to support certain named institutions (Article 8, Section 4), and, in general, the legislature has traditionally adhered to the spirit of the constitution by making lump-sum

appropriations to the universities which may be used in any way at the discretion of the governing board (See Chapter V). However, the power of the legislature to appropriate money has been generally thought to include the power to prescribe reasonable conditions for the use of the appropriations provided they do not interfere with the constitutional mandates to the governing boards of the universities. Such a doctrine is implicit in the homeopathic case of the *Regents v. Auditor General* in which the University did not receive its first appropriation because it could not satisfy either the Auditor General, or a majority of the Supreme Court, that it had appointed a homeopathic professor as required. Needless to say, it would be easy for the legislature to defeat completely the intent of the constitution by attaching sweeping conditions to appropriations which are very necessary for the proper support of the universities. In the cases in this chapter, the court has, therefore, limited the permissible scope of these conditions on appropriations.

The earliest case discussed in this chapter, *Weinberg,* was decided before the *Sterling* case. In *Weinberg,* subcontractors for the building of University Hospital sought to hold the University liable for failure to require the main contractors to post a bond to pay their subcontractors. A statute required all state agencies to obtain such bonds from their building contractors. In this case, the court was not required to decide the question of whether the statute could constitutionally be applied to the University. The more immediate issues were whether the statute should be interpreted as including the University, and, even if it did, whether the violation of the statute by a state officer was intended to give subcontractors a right to damages from the state agency. Since the court actually decided both these prior issues against the plaintiff, its ruling that the law was unconstitutional as applied to the University is, technically, only dicta. This dicta, however, took on new significance when the court itself, in later cases, cites it as authority.

A much more serious threat to University autonomy was presented in the next case in this series. The procedural framework of this case, mandamus, was becoming familiar—*Board of Regents v. Auditor General.* This time, the Auditor General had inquired into the uses of University funds and had decided that it was not proper to spend such money for field trips by students,

for President Angell's traveling expenses in attending the inaugurations of presidents of other universities, or for certain other purposes. This time the court had no trouble in unanimously voting to grant mandamus. The court ruled that "as against the discretion of the regents," the Auditor's function in this case is purely ministerial, that his judgment on the wisdom of University expenditures is irrelevant.

The power of the legislature to control the curriculum at the "agricultural college" (now Michigan State University) was decided in the first case of the *State Board of Agriculture v. Auditor General.* The legislature had tried to force the school to abandon its Engineering Department by limiting expenditure in that department to $35,000. This limitation on the use of funds was part of an increasing state appropriations to the school, but it applied to funds from all sources. At that time the agricultural college was largely supported from the proceeds of federal land grants.

In this case, the court ruled that "legislature exceeded its powers in attempting to deprive [the governing board] of its constitutional control of agricultural funds derived from the federal government." Since the whole act was declared void by the court, the former act which provided less state support for the college was declared to be still in effect.

The conditional appropriation was the issue in the next case, which was brought by the State Board of Agriculture against the Auditor General. The condition attached to an appropriation for the agricultural extension service of the then college had been interpreted by the Auditor General and the State Administrative Board, an agency of the executive branch of state government, to require the college's board to surrender complete control of the service to the State Administrative Board. The majority of the court ruled that such conditions were not constitutional. Since, in the majority's judgment, the legislature intended the appropriation itself to remain effective even though an unconstitutional condition were struck down, the court ordered the Auditor General to pay the full amount of the appropriation to the college. Three justices vigorously dissented.

The scope of the powers of the Board of Regents includes the power to sell or to lease land, even if the legislature has not

enacted specific enabling legislation. This was recognized in the 1863 case of *Regents v. Detroit Young Men's Society* and the relatively recent 1911 case of *Bauer v. State Board of Agriculture.* In effect, these cases hold that the constitutional provisions themselves have empowered the boards to act, and that they need not be supplemented by statute. Statutes, nevertheless, purport to delegate certain powers to these constitutional boards.[2]

Two workmen's compensation cases are included in this chapter because they raised constitutional questions. Both cases involve Michigan State University which resisted the application of workmen's compensation laws. The University of Michigan seems to have chosen to be covered because in two cases involving its employees[3] the University argued only the merits of each claim and did not claim exemption from the statute. In the first Michigan State case, *Agler,* the court interpreted the statute as then written not to cover the college without its consent. In *Peters,* decided in 1948, the court was equally divided. The amended statute now clearly included the college, and the deadlock in the high court resulted in sustaining an award in favor of an employee.

In the *Jackson Broadcasting and Television* case, the court refused to interfere with an arrangement between Michigan State University and a private company to share facilities of a shared time television channel. This case is particularly interesting because it is so recent, and because of the delicate treatment afforded one of the presently heated issues of university autonomy—whether a condition in an appropriations bill is valid which requires that the universities must surrender to the central state government the right to plan and design new university buildings in order to qualify for appropriations to erect the buildings.[4]

At the present time, an unresolved question concerning constitutional autonomy is the validity of the amended Hutchinson Act as applied to the universities. The text of this legislation is included at the end of this chapter. Whether the broad authority this statute invests in the State Labor Mediation Board, which extends far beyond traditional "mediation," encroaches on the constitutional prerogative of the Board of Regents to conduct its own internal affairs must be answered by the state's highest court.[5]

Weinberg v. The Regents of the University of Michigan

97 Mich. 246, 247-52, 252-53, 254-55; 56 N.W. 605 (1893)

MONTGOMERY, J. The plaintiff brought suit against the Regents of the University of Michigan, James B. Angell, James H. Wade, and Charles R. Whitman to recover the value of materials furnished to one Lucas, a subcontractor in the building of the University hospital. The right of action is claimed under Act No. 94, Laws of 1883, as amended by Act No. 45, Laws of 1885 (3 How. Stat. § 8411*a*). The declaration avers:

"That the Regents of the University of Michigan is a public corporation organized and existing under the laws of the State of Michigan, created for the government of the University of Michigan, which said institution belongs to and is the property of the State of Michigan, and is maintained at the expense of this State; that the defendant James B. Angell is the president of the Regents of the University of Michigan, and the executive head of the University of Michigan; that the defendant James H. Wade is the secretary; that the defendant Charles R. Whitman is a member of the Regents of the University of Michigan; that on or about the months of July and August, A.D. 1890, the Regents of the University of Michigan advertised for proposals for the erection and completion of a hospital building for the University of Michigan, which said hospital building, so to be erected and completed, was to be and has been built at the expense of this State; that afterwards, to wit, on the first day of October, A.D. 1890, in pursuance to said advertisement and proposals received, the bid of one William Biggs, of the city of Ann Arbor, was accepted, and on or about the date aforesaid the Regents of the University of Michigan entered into a contract with said William Biggs for the erection and completion of said hospital, in consideration of the sum of, to wit, $78,556, which said contract was signed by the defendants James B. Angell, James H. Wade, president and secretary as aforesaid, and by said William Biggs; that the defendant Charles R. Whitman was a member of the committee on buildings and grounds appointed by the Regents of the University of Michigan, which building committee was given full authority to act for the said Regents of the University of Michigan until otherwise ordered; that said Charles R. Whitman, as a member of said committee, was principally in charge of said undertaking of building said hospital; that afterwards the said William Biggs, by contract with one John Lucas, sublet a portion of the job for the building and erection

of said hospital; that the plaintiff, Julius Weinberg, is a laborer and material-man, engaged in the business of buying, selling, and furnishing stone, sand, and other material to contractors and other persons engaged in building, and other business in which such materials are used; that after the contract so made as aforesaid by the Regents to said Biggs, and by Biggs with said John Lucas, said Lucas, subcontractor as aforesaid, applied to the plaintiff to furnish stone for use in said hospital building, for which said Lucas agreed to pay plaintiff 85 cents for every 16 feet in length by one foot thick and one foot high, as the same was laid in the wall of said building.

"And the plaintiff further says that the defendants, the Regents of the University of Michigan, James B. Angell, James H. Wade, and Charles R. Whitman, were the board, officers, and agents of the State of Michigan, and made and entered into the contract for the erection of said hospital for and on behalf of the State of Michigan, and had the same built at the expense of this State; that it was the duty of said defendants as aforesaid, under section 8411*a*, as amended by Act No. 45, Public Acts of 1885, and sections 8411*b* and 8411*c*, Howell's Annotated Statutes, to require sufficient security by bond for the payment by the contractor and all subcontractors for all labor performed and materials furnished in the erection, repairing, or ornamenting of said hospital building."

The declaration further avers that plaintiff furnished the material in question, relying on such bond, and also avers that he has not received his pay, and concludes:

"And plaintiff further says that said defendants, in disregard of their duty aforesaid, negligently and carelessly, and in disregard of the rights of the plaintiff, neglected to require of said contractor the bond aforesaid, and permitted the said contractor to enter into said contract for the erection of said hospital building, and to enter upon the performance thereof, without giving security, by bond or otherwise, for the payment by said contractor and all subcontractors for the labor and materials furnished him or any subcontractor, as required by said statute."

To this declaration the defendants demurred, and the plaintiff joined in demurrer. The demurrer was sustained as to the individual defendants, and overruled as to the Regents of the University, and the plaintiff was permitted to amend as to the individual defendants. The defendant the Regents of the University of Michigan brings error. The plaintiff has, however, amended his declaration as against both defendants, and it is requested by both parties that the question of liability be here determined.

It is contended on behalf of the defendant that the statute does not apply to the Regents of the University of Michigan; that the University buildings are not built at the expense of the State, nor are they contracted for on behalf of the State, within the meaning of this statute; that they are constructed by a constitutional corporation, which may sue and be sued, and has power to take and hold real estate for any purpose which is calculated to promote the interests of the University.

The section, as amended by Act No. 45, Laws of 1885, provides:

"That when public buildings or other public works or improvements are about to be built, repaired, or ornamented under contract, at the expense of this State, or of any county, city, village, township, or school-district thereof, it shall be the duty of the board of officers, or agents, contracting on behalf of the State, county, city, village, township, or school-district, to require sufficient security by bond for the payment by the contractor and all subcontractors for all labor performed or materials furnished in the erection, repairing, or ornamenting of such building, works, ~~or~~ improvements."

We think the statute sufficiently broad to cover the contract in question. Act No. 145, Laws of 1889, appropriated—

"For the purchase of a site for and the erection of a hospital, for the year 1889, the sum of $25,000, and for the year 1890 the sum of $25,000: *Provided,* however, that no part of the above-named appropriations for the purchase of a site for and the erection of a hospital shall be paid out of the treasury until the city of Ann Arbor shall have bound itself to contribute the sum of $25,000 for the same purpose."

Section 2 provides for the assessment of taxes to pay this appropriation. Certainly, then, the undertaking was at the expense of the State and of the city of Ann Arbor, the contribution of the city of Ann Arbor, however, becoming State property upon its appropriation. We think it clear, also, that the Regents who acted in the matter were agents contracting on behalf of the State. They are officers elected by the voters of the State, whose duties relate to the control of public property. It is altogether too technical to say that the Regents were contracting on behalf of the University; for, while this is in a sense true, it is also true that they, by the very contract in question, provided for the expenditure of State money, and for the construction of a building which it would, I think, be news to most

residents of Michigan to learn is not State property. This is as much so as in the case of a school-district. *Auditor General v. Regents,* 83 Mich. 467.

It is contended by the defendant that the liability for neglect to require this bond attaches to the individuals who represented the State, county, city, village, township, or school-district in the letting of the contract, and not to the State or county or corporation of which they are directly the officers or agents. We think the defendant is right in this contention. In *Owen v. Hill,* 67 Mich. 43, and *Plummer v. Kennedy,* 72 Id. 295, the action was brought against the individuals composing the board. In *Wells v. Board of Education,* 78 Mich. 260, it was held that the officers were personally liable for materials on failure to take the required bond. Our attention has not been called to any case in which the municipality, in the case of a township or school-district, or a public or *quasi* public corporation, has been held liable as such, and it seems to us that there are insuperable objections to so holding. The duty rests upon the officers of the State, as well as cities, counties, and school-districts. Can it be intended that the State, which must act through its public officers, is to be held liable as for a tort for a mere neglect to take the bond required by this statute? It is true that it is urged that the Board of Regents is an agent of the State. This may be true in a certain sense, but we think the board, as a board, is not the agent contemplated by this statute, but that the officers who act directly are the ones who, as individuals, fall within the purview of the act. It may be doubtful to what extent the board of managers of a hospital which is a public institution, like the one in question, can be made liable for negligence; as to which see *McDonald v. Hospital,* 120 Mass. 432; *Glavin v. Hospital,* 12 R. I. 411. We do not deem it necessary to decide whether, under such circumstances as are involved in those two cases, the board of managers of the hospital, as a corporation, may not be liable. In such a case it might well be contended that it has undertaken to perform certain duties, and established relations towards the patients which impose upon the body in control certain duties. But the ground of the plaintiff's right to recover at all in this case is that this property is State property, and, further, that the building is being constructed at the expense of the State, and that the members of the board were acting for and on behalf of the State in making the contract. It could not be contemplated that the State or the public corporation is to be made liable. The individual guilty of the wrong or neglect of duty is the one against whom the action should be directed. Cooley, Torts, 621. The wrong is in the nature of a tort consisting of neglect of duty owing to the public generally, for which the public corporation as such is not liable, unless made so by statute.

It follows from the views expressed that the judgment should be reversed, and the case remanded, that the plaintiff may proceed against the individuals named in the amended declaration.

McGRATH, J., concurred with MONTGOMERY, J.

GRANT, J. I concur in the opinion of my Brother Montgomery that under Act No. 94, Laws of 1883, as amended by Act No. 45, Laws of 1885, the public corporation cannot be made liable, but only those officers or agents of such corporation to whom is committed the duty of letting contracts for the erection of public buildings or making public improvements. But I cannot concur in holding that the statute applies to the corporation known as "the Regents of the University of Michigan." The grounds, buildings, and other property of all the other State institutions, penal, reformatory, charitable, and educational, belong to the State. These institutions are the creations of the Legislature. They are under the exclusive control and management of the State. The State, which created them, may at any time repeal the laws by which they were established, and sell the property. The public buildings, public works, and public improvements mentioned in this statute mean those over which the State has control. This is evident from the language of the statute, which says:

"It shall be the duty of the board of officers, or agents, contracting on behalf of the State, * * * to require sufficient security by bond," etc.

The Regents make no contracts on behalf of the State, but solely on behalf of and for the benefit of the University. All the other public corporations mentioned in the Constitution, which have occasion to erect public buildings or to make public improvements, are expressly included in this statute. *Expressio unius est exclusio alterius.* It expressly enumerates the State, counties, cities, villages, townships, and school-districts. If the University were under the control and management of the Legislature it would undoubtedly come within this statute, as do the Agricultural College, Normal School, State Public School, asylums, prisons, reform schools, houses of correction, etc. But the general supervision of the University is, by the Constitution, vested in the Regents. Const. art. 13, §§ 7, 8.

* * *

Under the Constitution, the State cannot control the action of the Regents. It cannot add to or take away from its property without

the consent of the Regents. In making appropriations for its support, the Legislature may attach any conditions it may deem expedient and wise, and the Regents cannot receive the appropriation without complying with the conditions. This has been done in several instances.

Property aggregating in value nearly or quite half a million of dollars has been donated to the University by private individuals. Such property is the property of the University. It is not under the control of the State when it acts through its executive or legislative departments, but of the Regents, who are directly responsible to the people for the execution of their trust. So, when the State appropriates money to the University it passes to the Regents, and becomes the property of the University, to be expended under the exclusive direction of the Regents, and passes beyond the control of the State through its legislative department.

The University and the school-district are both provided for in the same article of the Constitution. Why should the Legislature mention the school-district in this statute, and leave out the University, if it was its intention to include the latter? The University is the property of the people of the State, and in this sense is State property, so as to be exempt from taxation. *Auditor General v. Regents,* 83 Mich. 467. But the people, who are the corporators of this institution of learning, have, by their Constitution, conferred the entire control and management of its affairs and property upon the corporation designated as "the Regents of the University of Michigan," and have thereby excluded all departments of the State government from any interference therewith. The fact that it is State property does not bring the Regents within the purview of the statute. The people may, by their Constitution, place any of its institutions or property beyond the control of the Legislature.

This Court has refused to compel the Regents to comply with certain provisions of acts of the Legislature against their judgment that they were not for the best interests of the University. *People v. Regents,* 4 Mich. 104; *People v. Regents,* 18 Id. 469; *People v. Regents,* 30 Id. 473. The Legislature was undoubtedly cognizant of the above decisions, for the questions involved were of considerable public interest.

These considerations lead me to the conclusion that the Regents are not included in this act, and that the judgment should be reversed, and judgment entered in this Court for the defendants.

Judgment entered accordingly.

HOOKER, C. J., and LONG, J., concurred with GRANT, J.

Board of Regents of the University of Michigan v. Auditor General

167 Mich. 444, 445-52; 132 N. W. 1037 (1911)

STEERE, J. In this proceeding the court is asked to decide whether the judgment of the auditor general or that of the board of regents shall prevail respecting the expenditure of moneys appropriated for the use and maintenance of the University by Act No. 102, Pub. Acts 1899. On April 30, 1906, the treasurer of the University made requisition upon the respondent for monthly expenditures from the appropriation of the so-called quarter-mill tax, amounting to $39,452.50, for the payment of current expenses. In making this requisition he followed the usual practice, which was in harmony with the methods prescribed by the accounting laws. The auditor general refused to draw his warrant upon the State treasurer for the amount of such requisition, for the reason that certain vouchers made by the regents for prior expenditures, which in his opinion were unlawful, had not been audited and allowed by him. These prior expenditures, amounting to $557.54, were for traveling expenses of Dr. Angell, president of the University, in attending alumni meetings and inaugurations of presidents of other universities, and for traveling expenses of other members of the faculty and officers, acting under the authority of the president and regents, in attending intercollegiate meetings and conferences as delegates or representatives of the University, and for the expenses of instructors in accompanying students in inspecting mechanical engineering plants, the same being a part of the prescribed course for certain engineering students. It was the opinion of the auditor general that such expenditures were not for the use and maintenance of the University, as contemplated by Act No. 102, Pub. Acts 1899, and consequently not for *lawful purposes* under the accounting laws of this State. The petitioner claims it has exclusive direction and control of all University expenditures, and asks for a writ of mandamus to compel respondent to draw his warrant on the State treasurer for the amount of the requisition above mentioned.

On behalf of the respondent it is urged that the writ should be denied for the following reasons:

"*First.* Because the quarter-mill tax appropriation must be dispersed in accordance with the accounting and appropriation laws of this State, and in refusing to comply with the conditions therein expressed the board of regents has violated the conditions upon which the appropriation was made.

"*Second.* Because it is the judgment of the auditor general, whose determination is final and conclusive, that the disbursements represented by the vouchers in question are for unlawful purposes.

"*Third.* Because the auditor general is prohibited by law from drawing his warrant upon the State treasurer for future requisitions until the amounts represented by the vouchers in question are returned to the institution treasury."

The moneys available for support and maintenance of the University consist of, *first,* interest on the University fund so called, being a fund derived from the sale of lands donated by the general government; *second,* fees received from students; *third,* appropriations made from time to time by the legislature of the State.

The funds in question are of the latter class, being appropriated by Act No. 102, Pub. Acts 1899, providing for a tax of one-quarter mill upon the taxable property of the State. This act, which is an amendment of a former act of similar import, consists of but one section, and reads as follows:

"SECTION 1. There shall be assessed upon the taxable property of the State as fixed by the State board of equalization, in the year 1899 and in each year thereafter, for the *use* and *maintenance* of the University of Michigan, the sum of one-fourth of a mill on each dollar of said taxable property to be assessed and paid into the State treasury of the State in like manner as other State taxes are by law levied, assessed and paid; which tax, when collected, shall be paid by the State treasurer to the board of regents of the University *in like manner as the interest on the university fund* is paid to the treasurer of said board; and the regents of the University shall make an annual report to the governor of the State of all the receipts and expenditures of the University: *Provided,* that the board of regents shall not authorize the building or the commencement of any additional building or buildings or other extraordinary repairs until the accumulation of savings from this fund shall be sufficient to complete such building or other extraordinary expense. *Also provided,* that the board of regents of the University shall maintain at all times a sufficient corps of instructors in all the departments of said University as at present constituted, shall afford proper means and facilities for instruction and graduation in each department of said University, and shall make a fair and equitable division of the funds provided for the support of the University in accord with the wants and needs of said departments as they shall become apparent; said departments being known as the departments of literature, science and art, department of medicine and surgery, department of law, school of

pharmacy, homeopathic medical college and the department of dental surgery. Should the board of regents fail to maintain any of said departments herein provided, then at such time shall only one-twentieth of a mill be so assessed: *Provided, further,* that the State treasurer be and is hereby authorized and *directed to pay* to the regents of the University, in the year 1899 and each year thereafter, in such manner as is now provided by law, upon the warrant of the auditor general, the amount of the mill tax provided for by this act; and that the State treasury be reimbursed out of the taxes annually received from said mill tax when collected; and said auditor general shall issue his warrants therefor as in the case of special appropriations."

Manifestly there cannot be a strict compliance with the two somewhat contradictory provisions as to time and manner of payment. In the enacting clause of the statute under consideration, the legislature provides for a quarter-mill tax, appropriates it to the use and maintenance of the University, and specifies that, *when collected,* it shall be paid to the regents in like manner as interest on the University fund is paid. It further requires that the regents shall annually make report of receipts and expenditures to the governor. Following this, in separate provisos, are two distinct conditions as to expenditure of this appropriation. *First,* it prohibits the use of savings, accumulated from the appropriation, for any new buildings or extraordinary repairs or expenses until such accumulations are sufficient to complete the same; *second,* the departments of the University are to be maintained in a certain manner, and by a final proviso the State treasurer is directed to each year *advance* from the State treasury the amount of the mill tax provided by the act, to be reimbursed from said tax when collected, and he is to pay the same "in such manner as is now provided by law." The respondent and his predecessors have construed this proviso as requiring payments to be made under the general accounting laws of the State, and have followed the procedure there pointed out, which course has been acquiesced in by the regents until this controversy arose over the authority of the auditor general to reject vouchers for expenditures authorized by the board when in his judgment they were not for lawful purposes.

He claims such authority under sections 3 and 5 of the accounting laws, being sections 1207 and 1209, 1 Comp. Laws; the material portions reading as follows:

"SEC. 3. Such account current, abstract, vouchers, and receipts, when received by the auditor general, shall be examined by him, and if found correct shall be so endorsed by him; and all

vouchers for expenditures, so far as the amount thereof shall appear to be for lawful purposes, he shall audit. * * *

"SEC. 5. Money appropriated by any act of the legislature for the use or benefit of any State educational, charitable, reformatory or penal institution, or to be disbursed by any officer, may be drawn from the State treasury upon the warrant of the auditor general, as follows, viz.: Under appropriations for current expenses monthly for *pro rata* amounts: * * * *Provided,* that when appropriations are made for current expenses, or general purposes, where no itemized estimates were furnished as a basis therefor, then the class of disbursements shall be determined by the officer, or board of the institution making them, and if the same shall appear to the auditor general to be within the range of reasonable purposes he shall approve the account. * * * "

In passing upon statutory provisions which are obscure or conflicting, the practical construction which State officials, with a duty to perform thereunder, have, during a long period adopted and followed with reference to their meaning, and which has been acquiesced in all parties in interest, is entitled to weight, and has been favored by the courts when not manifestly in conflict with the intent and spirit of the act. In harmony with that rule of construction, we are disposed to accept the interpretation of the law adopted and acted upon by respondent and relator as to the time and manner of payment; but, in the light of constitutional provisions, legislation, and decisions of this court touching the authority of the board of regents to control the affairs of the University, cannot hold that the judgment of the regents as to the legality and expendiency of expenditures for the use and maintenance of the institution is subordinate to that of the auditor general.

The leading thought and clearly expressed object of the final proviso under consideration is the advancement during each year of this appropriation from the State treasury for current expenses, to be later replaced when the tax is collected. To that extent it clearly modifies the enacting clause, but words found in the body of the act, following the phraseology of previous acts of like nature, paralleling the appropriations made, with the University interest fund, have a significant bearing on the intent of the legislature. It is an elementary rule of construction that all words found in the act are presumed to be made use of for some purpose, and, so far as possible, effect must be given to every clause and sentence.

The proper function of a proviso is to restrain, or in some manner modify, the general provisions of an enacting clause. It is not to be extended or enlarged by inference, but strictly construed and

limited to the object plainly within its terms.

By the provisions of the Constitution of 1850, repeated in the new Constitution of 1909, the board of regents is made the highest form of juristic person known to the law, a constitutional corporation of independent authority, which, within the scope of its functions, is co-ordinate with and equal to that of the legislature. By the old Constitution it is given "direction and control of all expenditures from the University interest fund" (section 8, art. 13); and by the new Constitution "general supervision of the University, and the direction and control of all expenditures from the University funds." Section 5, art. 11. That the board of regents has independent control of the affairs of the University by authority of these constitutional provisions is well settled by former decisions of this court. *People v. Regents,* 4 Mich. 98; *Weinberg v. Regents,* 97 Mich. 254 (56 N. W. 605); *Sterling v. Regents,* 110 Mich. 382 (68 N. W. 253, 34 L. R. A. 150); *Bauer v. State Board of Agriculture,* 164 Mich. 415 (129 N. W. 713). Strong and unequivocal language is used in these decisions.

"The respondents are constitutional officers to whom are confided by the Constitution 'the general supervision of the University, and the direction and control of all expenditures from the University interest fund.' * * * To their judgment and discretion as a body is committed the supervision of the financial and all other interests of an institution in which all the people of this State have a very great interest." *People v. Regents, supra.*

"But the general supervision of the University is by Constitution vested in the regents. * * * So, when the State appropriates money to the University it passes to the regents and becomes the property of the University, to be expended under the exclusive direction of the regents, and passes beyond the control of the State through its legislative department. * * * Under the Constitution, the State cannot control the action of the regents. * * * It cannot add to or take away from its property without the consent of the regents. In making appropriations for its support the legislature may attach any conditions it may deem expedient and wise, and the regents cannot receive the appropriation without complying with the conditions. This has been done in several instances." *Weinberg v. Regents, supra.*

The able and exhaustive opinion by Justice GRANT in *Sterling v. Regents, supra,* reviews the causes which led up to these former decisions and reaffirms them. In the recent case of *Bauer v. State Board of Agriculture, supra,* the *Sterling Case* is cited with approval.

That conditions may be attached by the legislature to appropriations for the University is well settled. In such case the regents may

accept or reject such appropriation, as they see fit. If they accept, the conditions are binding upon them. In this act appropriating the quarter-mill tax, now three-eighths of a mill (Act No. 303, Pub. Acts 1907), are specific conditions as to reporting to the governor, maintaining the departments, and use of accumulations. With these the regents must comply. For a failure to maintain any of said departments the penalty is a reduction of the tax to one-twentieth of a mill, but beyond that the money passes to the regents, and becomes the property of the University, to be expended under the exclusive direction of the regents.

We cannot construe the language of the final proviso of the act in question as an intent on the part of the legislature to overthrow the public policy of over half a century, plainly deducible from the general course of legislation and adjudication relating thereto, or as a purpose on their part to refuse aid to the University, unless the regents surrender their constitutional right to control the affairs and finances of the institution, and submit their judgment as to the wisdom and expediency of detailed expenditures for current expenses to that of the auditor general. Neither in construing this proviso can we interpret it as an intent thus by indirection to enlarge the scope of the enacting clause and ingraft upon this appropriation all conditions and restrictions found in the accounting laws of the State, together with any legislation which may be read in connection therewith.

No money is paid out of the State treasury except on the warrant of the auditor general. In this case, as in many others, his duties are purely ministerial. As against the discretion of the regents in expenditure of the University funds he exercises no judicial functions. As to him, in the performance of his official duties, vouchers for expenditures made within the amount of the appropriation, when authorized by the board of regents and properly authenticated by the duly constituted officials, are, within the meaning of the law, "for lawful purposes."

A writ of mandamus will issue as prayed.

OSTRANDER, C. J., and MOORE, McALVAY, BROOKE, BLAIR, and STONE, JJ., concurred. BIRD, J., did not sit.

State Board of Agriculture v. Auditor General

180 Mich. 349, 350-61; 147 N. W. 529 (1914)

Under the Constitution and laws of the State, money may be drawn from the State treasury only upon the warrant of the auditor general. On the 23d of March last the auditor general declined to draw warrants for certain sums asked for by the State board of agriculture, basing his action upon the legislative declaration found in Act No. 324 of the Public Acts of 1913, which appropriates and orders to be levied for the use of the agricultural college, in the year 1913 and thereafter, annually one-sixth of a mill on each dollar of the taxable property in the State, and concludes as follows:

"SEC. 1 (*a*). No part of this or any other appropriation shall be available in case a sum in excess of thirty-five thousand dollars from any or all sources, shall be expended in any one fiscal year for all the maintenance of the mechanical and engineering department."

When the warrants were refused, a sum in excess of the requisitions stood credited to the agricultural college fund. Requisitions previously honored advised the auditor general that a sum in excess of $35,000 had been expended in maintaining the mechanical and engineering department of the college since June 30, 1913.

The State board of agriculture filed its petition for an order requiring the auditor general to draw the refused warrants and such others as it might be entitled to. The auditor general made answer, and, upon the petition and answer, there being no disputed facts, the matter has proceeded to a hearing. It is asserted, in concluding the petition, that, if the auditor general's construction of the act of 1913 is the correct one, it prevents relator's performing duties imposed by the Federal statutes and those imposed upon it by the Constitution of the State; that the appropriation, in view of the condition, is not one which it is free to accept or reject. It cannot reject the appropriation without disobeying constitutional mandates; it cannot accept it and perform the condition without denying itself the exercise of constitutional powers. The condition is not within the title of the act. The act may be construed to limit the expenditure of moneys raised by taxation and appropriated by the act, in which case it has been complied with. If it may not be so construed, the condition is altogether unconstitutional, and relator is entitled to receive the appropriation.

In behalf of the respondent auditor general the attorney general contends that:

"An examination of the conditions found in section 1 (*a*) of the act under consideration demonstrates that the provisions are in no wise ambiguous, and there can be no serious question as to the purpose of the legislature in attaching this condition. Undoubtedly it was the same purpose that prompted the condition attached in the regents' case involving the homeopathy department. It is not a question for this Court, we respectfully submit, nor is it a question for the administrative officers of the State, whether the agricultural college shall continue as a competitor against another institution maintained at State expense of over $200,000 per year; nor is it a question for this Court or the administrative officers of the State whether this legislation is wise in policy or not; nor is it a question, we respectfully submit, for relator board to determine. The money in the treasury of the State was the property of the State; none of it was the property of the agricultural college until appropriated by the legislative branch of the State government. That branch of the State government has the exclusive control of appropriations to State institutions, and may prescribe the amount and condition upon which any of the public institutions of the State can withdraw the same. If, in the wisdom of the legislature, it is inadvisable to continue two appropriations to two institutions which are duplicating work in the State, neither the courts, the administrative officers, or administrative boards can set aside such action.

"Relator understood clearly the conditions under which this appropriation was made; it understood clearly that, if the act was valid, its engineering department must be curtailed; and, while protesting against the power of the legislature to attack such conditions, it continued to make its requisitions upon the auditor general and to receive the money appropriated to it under this and other acts, and to use such money contrary to the conditions found in this act. The people, by the Constitution of 1908, gave to relator powers never before possessed by the controlling board of the agricultural college, the same powers exercised by the regents of the university, but they still reserved to their representatives chosen each two years the right to determine the appropriations to be made, not only to the other State institutions, but also to the university and the agricultural college. The respondent is but carrying out the conditions imposed under the act in question. Relator's present position, if unfortunate, arises from its failure to recognize that the legislature, and the legislature alone, holds the purse strings of the State."

To understand and to dispose of the contention presented, it is necessary to refer to facts appearing in the pleadings of evidence by the Constitution of the State and Federal and State statutes. By the

Constitution of 1909 the State board of agriculture is made, what before it was not, a constitutional board and body corporate. It is given general supervision of the college and direction and control of "all agricultural college funds." Article 11, § 8. Sections 10 and 11 of article 11 read, respectively, as follows:

"SEC. 10. The legislature shall maintain the university, the college of mines, the State agricultural college, the State normal college, and such State normal schools and other educational institutions as may be established by law.

"SEC. 11. The proceeds from the sales of all lands that have been or hereafter may be granted by the United States to the State for educational purposes and the proceeds of all lands or other property given by individuals or appropriated by the State for like purposes shall be and remain a perpetual fund, the interest and income of which, together with the rents of all such lands as may remain unsold, shall be inviolably appropriated and annually applied to the specific objects of the original gift, grant or appropriation."

Agricultural college funds, when the Constitution was adopted, consisted of sums paid for tuition, receipts from sales of products of the institution, a grant of money by the Federal government, the interest paid by the State upon money received from sales of land granted by the Federal government (the proceeds of the sales having been covered into the State treasury), and, lastly, the proceeds of a tax of one-tenth of a mill levied annually upon the valuation of taxable property of the State pursuant to the provisions of Act No. 232 of the Public Acts of 1901 (4 How. Stat. [2d Ed.] § 9808). The condition attached to the Federal grant of lands was:

"That all moneys derived from the sale of the lands aforesaid by the States to which the lands are apportioned, and from the sales of land scrip hereinbefore provided for, shall be invested in stocks of the United States or of the States, or some other safe stocks, yielding not less than five per centum upon the par value of said stocks; and that the moneys so invested shall constitute a perpetual fund, the capital of which shall remain forever undiminished (except so far as may be provided in section fifth of this act), and the interest of which shall be inviolably appropriated, by each State which may take and claim the benefit of this act, to the endowment, support, and maintenance of at least one college, where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the

legislature of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life."

And the Federal grants of money were made to the State for the more complete endowment and maintenance of such agricultural college as had been or might be established in accordance with the original land grant act. Formal acceptances of the Federal bounty were made by the legislature (Acts Nos. 46 and 140, Session of 1863; Act No. 80, Session of 1891), and it was formally devoted to the maintenance of the agricultural college. Including the interest paid by the State, the proceeds of Federal bounty amount to more than $120,000 annually. Although one purpose of the Federal grants was the teaching of mechanic arts, and instruction was in some degree afforded in mechanic arts, it was more than 20 years after the first grant was made before a mechanical department was established at the college. Act No. 42, Public Acts 1885. Since it was established, the State board of agriculture has been repeatedly expressly charged with the maintenance of the department. Section 15 of Act No. 188, Public Acts of 1861, an act which reorganized the college, provides a course of instruction as follows:

"The course of instruction shall embrace the English language and literature, mathematics, civil engineering, agricultural chemistry, animal and vegetable anatomy and physiology, the veterinary art, entomology, geology, and such other natural sciences as may be prescribed, technology, political, rural and household economy, horticulture, moral philosophy, history, bookkeeping, and especially the application of science and the mechanic arts to practical agriculture in the field."

To refer to no other instances, in Act No. 232, Public Acts of 1901, is found the following condition:

"The Michigan State board of agriculture shall maintain at all times a sufficient corps of instructors in all the courses of study of the agricultural college as at present constituted, * * * the same being known as the agricultural department, the mechanical department and the woman's department; * * * and shall make a fair and equitable division of the funds provided by this act in accord with the wants and needs of said courses of study. * * * "

And the concluding language of the section is:

"Should the State board of agriculture fail at any time to maintain any of said departments as herein provided, the terms of this act shall be suspended until further action by the legislature."

The mechanical department has grown in importance until it now represents an investment of more than $227,000. To maintain it during the year ending June 30, 1913, there was expanded $27,000 for supplies, machinery, and maintenance of buildings, and about $34,000 for salaries of professors and instructors.

Following the enactment of the law in question here and before any money had been drawn under it, the State board of agriculture made a statement in writing, copies of which were sent to the State officers, in which statement, after reviewing the history of the mechanical and engineering department of the college and the Federal and State legislation pertaining thereto, the following conclusions are set forth:

"The board is advised by reputable legal counsel, and it believes, that under the Constitution of the State, the legislature has no authority to enact the limiting provision hereinbefore first referred to, and especially that it had no power to limit or determine the use of the Federal funds. However, without in any manner accepting the provisions of said limitation, and without waiving our right to insist upon its invalidity, we respectfully make the following declaration of our intention in reference to said mechanical and engineering department:

"(*a*) We shall continue that department as now conducted and as it may legitimately grow and develop.

"(*b*) We shall limit the annual expenditure of State funds in this department to $35,000.00.

"(*c*) For the remainder of the necessary expenditure we shall use a sufficient portion of the funds of the Federal government.

"(*d*) The secretary is instructed to mail certified copies of this statement, and the action of the board in reference thereto, to the governor, the auditor general, the State treasurer, the attorney general and to the president of the senate and the speaker of the house."

As matter of bookkeeping, the auditor general credits the agricultural college fund with all moneys belonging to it. During the fiscal year beginning July 1, 1913, and until the month of March, 1914, requisitions upon the fund were honored until a sum in excess of $400,000 had been paid upon the requests of the State board of agriculture, there remaining in the fund in March, 1914, when further demands were refused, a sum in excess of $190,000.

OSTRANDER, J. *(after stating the facts).* In attempting to find the meaning to be given to section 1 (*a*), it will be assumed that the legislature knew that, independent of the immediate appropriation, there was a fund already devoted to the needs of the college larger than any sum likely to be used to maintain the particular department. If the purpose was to limit the total sum which should be expended to maintain that department, it could not be accomplished by limiting the amount which might be taken from the immediate appropriation. If there was no purpose to limit the total amount which might be expended, the provision is wholly insensible. In any event, the words "from any and all sources" may not be disregarded. Section 1 (*a*) cannot be held as intended merely to place a limitation upon the amount to be taken from the immediate appropriation to be used in maintaining the mechanical and engineering department.

While no reading and no analysis of the language employed leaves one entirely certain of the meaning of the provision, it seems most reasonable to say that the purpose was to limit expenditures for maintaining the particular department to $35,000 annually, and to make unavailable for the use of the college all of its funds in case the maximum thus fixed was exceeded. I do not overlook the language, "No part of this or any other appropriation shall be available," nor the actual occurrence of a result which was inevitable; namely, that unless the declaration of the relator board was to be accepted for the fact some part of the immediate and of other appropriations would of necessity be available, if the college was to continue to exist, since it could not be known before the fact whether relator would or would not expend more than $35,000 in maintaining the particular department. Some question might be raised also about the meaning of the words "or any other appropriation." The reference might be to an unexpended appropriation or the term "appropriation" used to designate, and not improperly, the earlier legislation which devoted the Federal gifts to the maintenance of the college. But I think we must say that the legislative purpose expressed in this statute is the one to which the respondent has given effect, and, assuming the law to be valid, respondent cannot be required to issue to relator further warrants for money.

We must either say this, or else conclude that section 1 (*a*) was added to the act as an admonition, and not a command, or a condition; that it expresses the opinion of the legislature with respect to the manner in which the agricultural college funds shall be employed. If it was an admonition merely, the act could, of course, stand without it. Because of the language employed in section 1 (*a*) I do not feel warranted in concluding that it is admonitory only. It is therefore necessary to determine whether the legislature has, as it is

claimed, exceeded its constitutional powers, and, if it has, then the state of the applicable law.

If section 1 (*a*) be held to be valid, its effect would be legislative supervision of the college. To determine that a department of the college which has been maintained at a cost of $60,000 annually for instructors and supplies shall be from a given date maintained at a cost of $35,000 annually for instructors and supplies is to determine that it shall have fewer supplies, or fewer, or less capable, instructors, or both. It is something more than reducing a general appropriation so that the expenses in some or in all departments of the college must be reduced, leaving the proper supervisors to determine how efficiency can be best maintained under new conditions. The Constitution has given to the relator the general supervision of the college and the direction and control of all agricultural college funds. So long as the relator employs them for the purposes intended by the grant, it is beyond the power of the legislature to control the relator's use of the funds received from the Federal government and long ago appropriated to the agricultural college. Undoubtedly the grant of funds was to the State, and the disposition of them wholly within the power of the State, acting through its legislature, in accordance with the conditions of the trust imposed. *Montana, ex rel. Haire, v. Rice,* 204 U.S. 291 (27 Sup. Ct. 281); *Wyoming, ex rel. Wyoming Agricultural College, v. Irvine,* 206 U.S. 278 (27 Sup. Ct. 613). See, also, *Massachusetts Agricultural College v. Marden,* 156 Mass. 150 (30 N. E. 555). I am called upon to neither affirm nor deny the proposition that the legislature may now appropriate the Federal fund, in whole or in part, to some other institution, withdrawing it, or some of it, from the agricultural college, so long as it keeps faith with the congress. The legislature has not withdrawn it from the college nor appropriated it, or any part of it, to another institution. It remains an *agricultural college fund,* within the meaning of the Constitution, devoted, under the supervision and direction of the relator, to the college and to the purposes expressed in the grant, in State legislation, and, finally, in the Constitution of the State. It is required to be "annually applied to the specific objects of the original gift, grant or appropriation." Necessarily it must be so applied, under existing conditions, by the constitutional supervisors of the fund, and of the college, and not by the legislature. It follows that the legislature exceeded its powers in attempting to deprive the relator of its constitutional control of agricultural college funds derived from the Federal government. The constitutional powers of the State board of agriculture with respect to the college and its funds are the same as those of the board of regents of the university with respect to the university and its funds, and authority for the conclusion

stated may be found in *Sterling v. Regents of the University,* 110 Mich. 369 (68 N. W. 253, 34 L. R. A. 150); *Board of Regents v. Auditor General,* 167 Mich. 444 (132 N. W. 1037), as well as in *Bauer v. State Board of Agriculture,* 164 Mich. 415 (129 N. W. 713).

I assume that the legislature, in amending the original bill by adding section 1 (*a*) thereto, acted in good faith and with the highest motives. I am obliged to find that in doing so constitutional powers were exceeded. I am obliged to find, further, that the legislative intent was to deprive the college of all funds, however derived, upon the contingency expressed in the act. This being so, the question is whether it can be said that the act would have passed without the condition.

In deciding this question, we are not concerned with, do not inquire into, and cannot know the purpose and intent of legislators. We must look at the law itself and judicially ascertain the intent of the legislature.

"If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail unless sufficient remains to effect the object without the aid of the invalid portion. And if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently, then if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them." Cooley's Constitutional Limitations (6th Ed.), p. 211.

There are some facts which we may and do know which aid us in this inquiry. We know that in the year 1901, and until the year 1913, the State appropriation for the agricultural college was one-tenth of a mill. In 1913, by the act in question here, this appropriation was increased, upon condition, to one-sixth of a mill. The appropriation made in 1901 does not fail if the act of 1913 is held invalid. The college will still receive the proceeds of a tax of one-tenth of a mill upon the taxable property of the State, and it appears that upon this basis something remains in the treasury. It is contended that the decision of this court in *Moreland v. Millen,* 126 Mich. 381 (85 N. W. 882), supports the ruling that the act may stand, notwithstanding the invalid condition, and that to hold otherwise is to overrule the decision in that case. I have read the opinions delivered in that case with

care and with no disinclination to sustain the relator in this controversy. The cases seem to me to be wholly unlike. For the purposes of the decision in that case, it was assumed in the majority opinion that the legislature, in the act there in question, sought to improve the method of administering public works in the city of Detroit. The act made radical changes in the existing law. It provided finally that a superintendent of public works should be appointed, for a designated, but short, period of time, by the governor of the State, and thereafter by the mayor of the city. It was held that the legislature exceeded its powers in providing for the provisional appointment, but that the whole law was not thereby made invalid. It was held further that, an office having been created by the act, the mayor might proceed at once to fill it by appointment. In that case the invalid portion of the act provided for a mere detail; in this case it is the condition upon which an increased appropriation is made. It is as though the legislature, in 1913, had for that year, and each succeeding year, provided a fund for the college, and for a further sum to be given it upon condition.

The whole act must fail, and, this being so, the respondent should be advised (it is unlikely that a writ will be necessary) that the act of 1913 is void; that the act of 1901 is in force; that the fund derived from the Federal government and a fund equal to the one created by that act are within the control of the relator.

McALVAY, C. J., and BROOKE, KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

State Board of Agriculture v. Auditor General

226 Mich. 417, 418-36; 197 N. W. 160 (1924)

MOORE, J. The writ of mandamus is sought to compel the auditor general to issue his warrant on the State treasurer in favor of the Michigan Agricultural College for $75,000. The State administrative board is made a party defendant for the reason that the auditor general refuses to issue said warrant because said board has directed him not to do so.

This proceeding calls for a construction of Act No. 308, Pub. Acts 1923, which reads:

"For carrying on the co-operative agricultural extension work under the provisions of an act of congress approved May eight,

nineteen hundred fourteen, entitled 'An act to provide for co-operative extension work between the agricultural colleges for the several States receiving the benefits of an act of congress approved July two, eighteen hundred sixty-two, and acts supplementary thereto, and the United States department of agriculture,' and such other extension work as the State board of agriculture may designate, the sum of

	For Fiscal Year 1923-1924	For Fiscal Year 1924-1925
Annual appropriation for extension work	$150,000.00	$150,000.00
Special fund for research work	35,000.00	35,000.00
Horticultural building including green house and equipment	200,000.00	200,000.00
Extensions and additions to power house and equipment	75,000.00	75,000.00
Farm and miscellaneous buildings and incidental additions to buildings	50,000.00	50,000.00
Hospital	50,000.00	
Totals	$560,000.00	$510,000.00

"Each of said amounts shall be used solely for the specific purposes herein stated, subject to the general supervisory control of the State administrative board."

The act of congress mentioned is known as the Smith-Lever act (38 U.S. Stat. p. 372; 3 Fed. Stat. Ann. [2d Ed.] at page 108). By this act the Federal government appropriated moneys,—

"1. To aid in diffusing among the people of the United States useful and practical information on subjects relating to agriculture and home economics and to inaugurate in each State agricultural extension work to be carried on by the agricultural or land grant colleges, in co-operation with the United States department of agriculture. * * *

"2. The contemplated co-operative extension work to consist of instruction and practical demonstrations in agriculture and home economics to persons not attending or residing in said colleges. This work to be carried on in such manner as may be mutually agreed

upon by the United States secretary of agriculture and the agricultural college receiving the benefit of the act. * * *

"3. Before any college receives its share of the Federal appropriation each year, plans for the work to be carried on under this act to be submitted by the proper officials of each college and approved by the secretary of agriculture.

"4. With the exception of the $10,000 preliminary appropriation above referred to, no payment to be made of Federal funds to any State until an equal sum has been appropriated for such year by the legislature of such State or until it has been provided by the State, county, college, local authority or from individual contributions within the State for the maintenance of the co-operative agricultural extension work provided for in the act."

By Act No. 65, Pub. Acts 1915 (1 Comp. Laws 1915, § 1272), the Michigan legislature accepted the offer made in the Smith-Lever act, "under the terms and conditions expressed in said act."

Section 2 of said act provides:

"The moneys derived by authority of said act shall be exclusively used in support of co-operative agricultural extension work, to be carried on by Michigan Agricultural College, and the secretary of the State board of agriculture is hereby designated as the officer to whom such funds should be paid."

An agreement was made between the Agricultural College and the United States department of agriculture regarding the conduct of said co-operative extension work. It will not be necessary to quote the details of this agreement. In it the parties mutually agreed:

"(*a*) That all co-operative extension work be planned under the joint supervision of the director of extension work of the college, subject to the approval of the president of the college and the agriculturist in charge of demonstration work for the United States department of agriculture, and subject to the approval of the secretary of agriculture or his representative, and that the approved plans for such extension work in Michigan should be executed through the extension division of said college in accordance with the terms of so-called individual projects agreements.

"(*b*) That all co-operative extension work agents in Michigan, under this and subsequent agreements, be joint representatives of the college and the United States department of agriculture, unless otherwise expressly provided, and that such co-operation be plainly set forth in all literature issued either by the college or said department of agriculture.

"(*c*) That the plans for use of Smith-Lever funds be made by the extension division of the college, but subject to the approval of the secretary of agriculture, and when so approved, be executed by the extension division of the college.

"(*d*) That headquarters of the Michigan organization shall be the Michigan Agricultural College."

A director was appointed by the plaintiff as director of extension work and his appointment was approved by the United States secretary of agriculture and he is now acting in that capacity.

Differences arose between the plaintiff and the State administrative board, which resulted, as before stated, in the auditor general refusing to issue his warrant for any part of the $150,000 appropriated by Act No. 308, Pub. Acts 1923.

The refusal of the defendant to turn over the money is based upon the provision of Act No. 308, Pub. Acts 1923, which reads:

"Each of said amounts shall be used solely for the specific purposes herein stated, subject to the general supervisory control of the State administrative board."

Article 11 of the Constitution of Michigan reads in part:

"SEC. 7. * * * The members thus elected and their successors in office shall be a body corporate to be known as 'The State Board of Agriculture.'

"SEC. 8. * * * The board shall have the general supervision of the college, and the direction and control of all agricultural college funds." * * *

Act No. 269, Pub. Acts 1909 (1 Comp. Laws 1915, § 1233 *et seq.*), reads in part:

"SEC. 2. The government of the Michigan Agricultural College shall be vested in the State board of agriculture.

"SEC. 6. * * * The State board of agriculture shall have the general supervision of the Michigan Agricultural College; * * * of all appropriations made by the State or by congress for the support of said college, or for the support of the experiment station or any sub-station, or for any other purpose for which said college is created. * * *

"SEC. 7. The board shall fix the salary of the president, professors and other employees, and shall prescribe their respective duties. * * *

"SEC. 9. The board shall direct the disposition of any moneys appropriated by the legislature or by congress for the Agricultural College." * * *

These provisions of the Constitution and the statute of the State were in force when Act No. 308, Pub. Acts 1923, was enacted, and, it may be safely assumed, were known to the legislature.

We deem it unnecessary to go into a discussion of the question of how far the legislature may go in granting authority to the administrative board to take part in the management of the affairs of the Agricultural College, in view of the constitutional provision we have quoted. Nor do we think we are called upon to say just what was meant by the use of the words "subject to the general supervisory control of the State administrative board." The legislature made a definite appropriation to carry out extension work under the provisions of the Smith-Lever act, "and such other extension work as the State board of agriculture may designate." The language "subject to the general supervisory control of the State administrative board," given in the concluding portion of the act, did not give the board the right to withhold the appropriation.

The writ will issue as prayed, but without costs.

McDONALD, J. I am in entire disagreement with the conclusions reached by Justice WIEST in reference to the powers and duties of the State board of agriculture. If his opinion is to prevail we will have completely overturned the well settled policy of the State relative to the management and control of the University and of the Agricultural College. These institutions of learning are very close to the hearts of the people of Michigan. They have made of them the most unique organizations known to the law, in this, that they are constitutional corporations created for the purpose of independently discharging State functions. The people are themselves the incorporators; the boards that control them are responsible only to the people who elect them; they are independent of every other department of the State government. Exercising these functions in this manner, it was quite inevitable that they should come into conflict with the State administrative board to which the legislature has delegated authority to intervene in the affairs and direct the policy of every State institution. Thus this controversy has arisen.

As viewed by the plaintiff, the question involved is whether the State board of agriculture shall continue to exclusively manage the affairs of the college as provided by the Constitution, or surrender its rights to the State administrative board. As it appears to the defendant, the question is whether it may not exercise general

supervisory control over funds received by the college by way of appropriations from the legislature without invading the constitutional rights of the State board of agriculture.

The State board of agriculture stands on the same constitutional footing as the board of regents of the University. The progress which our University has made is due in large measure to the fact that the framers of the Constitution of 1850 wisely provided against legislative interference by placing its exclusive management in the hands of a constitutional board elected by the people. The underlying idea was that the best results would be attained by centering the responsibility in one body independent of the legislature and answerable only to the people. See *Sterling* v. *Regents of University,* 110 Mich. 382 (34 L. R. A. 150). For this reason the Constitution gave the regents the absolute management of the University, and the exclusive control of all funds received for its use. This court has so declared in numerous decisions. *People* v. *Regents of University,* 4 Mich. 98; *Weinberg* v. *Regents of University,* 97 Mich. 254; *Sterling* v. *Regents of University, supra; Regents of University* v. *Auditor General,* 167 Mich. 444.

The policy thus consistently upheld by the court has proven so satisfactory to the people that in the constitutional convention of 1908 similar action was taken with reference to the Agricultural College. The State board of agriculture was made a constitutional body; it was given the sole management of the affairs of the college and exclusive control of all of its funds. At this time a part of the college funds was received by way of appropriations from the legislature. In providing that the State board of agriculture should have control of the affairs of the college and the funds devoted to its use, the Constitution makes no exception as to funds from any particular source; it says, "All funds." But the contention of my Brother WIEST that moneys appropriated by the legislature are not college funds in the constitutional sense, is answered by Mr. Justice GRANT in *Weinberg* v. *Regents of University, supra.*

"When the State appropriates money to the University it passes to the regents, and becomes the property of the University, to be expended under the exclusive direction of the regents, and passes beyond the control of the State through its legislative department."

There is, however, a distinction between funds received by way of appropriations and other college funds. The appropriation may be upon condition that the money shall be used for a specific purpose, or upon any other condition that the legislature can lawfully impose. The language used in some previous decisions of this court

in reference to this question seems to have been misunderstood. For instance, the following:

"In making appropriations for its support, the legislature may attach any conditions it may deem expedient and wise, and the regents cannot receive the appropriation without complying with the conditions." *Weinberg* v. *Regents of University*, 97 Mich. 246, 254.

Clearly, in saying that the legislature can attach to an appropriation any condition which it may deem expedient and wise, the court had in mind only such a condition as the legislature had power to make. It did not mean that a condition could be imposed that would be an invasion of the constitutional rights and powers of the governing board of the college. It did not mean to say that, in order to avail itself of the money appropriated, the State board of agriculture must turn over to the legislature management and control of the college, or of any of its activities. This logically leads us to a consideration of the character of the condition attached to the appropriation involved in the instant case. Is it a condition that the legislature had power to make? The appropriation (Act No. 308, Pub. Acts 1923) is subject to two conditions, *first,* that the money appropriated shall be used for the specific purpose of carrying on co-operative agricultural extension work under the provisions of an act of congress, known as the "Smith-Lever act (38 U.S. Stat. p. 372)," and *second,* that it "shall be used * * * subject to the general supervisory control of the State administrative board."

It is not an easy matter to separate a supervisory control of the expenditure of money for extension work from a control of the work itself. Whatever meaning the legislature intended the term "general supervisory control" to import, there is no question as to the interpretation given to it by the State administrative board. It appears in the following resolution adopted on July 10, 1923:

"1. That the general supervision of the extension work of the Michigan Agricultural College, together with the authority to hire county agents and all other employees and to prescribe their duties and fix their salaries, be placed by the State board of agriculture by proper resolution, in the hands of the dean of agriculture of the college.

"2. That county agents receive their entire salaries and expenses from the Federal government, the State, or the several counties of the State, but from no other source.

"3. That the dean of agriculture submit to this board immediately a revised budget of salaries and expenses based under the

Smith-Lever act, the United States department of agriculture, and the State and county appropriations, and if these funds are insufficient to carry on the work as outlined, the matter be referred to this board for further attention."

From the above resolutions it will be noted that, exercising its legislative right to "general supervisory control," the State administrative board proposes to take the extension work entirely out of the hands of the board of agriculture and give it over to a dean of the college. In this the State administrative board is assuming to exercise authority vested by the Constitution solely in the board of agriculture. It is not a question as to the wisdom of the method proposed by the administrative board. The business policy and management of all of the affairs of the college belongs to the State board of agriculture. The people, speaking through their Constitution, have so decreed. It is also proposed to reject contributions from county farm bureaus, amounting to $191,489, on the theory that it is not only unlawful but a bad business policy to allow the bureaus to pay a part of the salaries of employees engaged in extension work. It may be so, but the right to accept or reject contributions to carry on any college activity is a matter to be determined exclusively by the State board of agriculture. The legislature cannot interfere nor can it delegate any authority to the administrative board which it, itself, does not possess. My Brother WIEST justifies the delegation of such authority by the legislature on the ground that it is a part of the present-day legislative policy in carrying out a modern system of State finance. The efficiency of the present system may well be conceded, but it cannot be applied to the affairs of the University or the College, because the Constitution forbids it. The legislative enactments quoted by my Brother, as giving the State administrative board the right to intervene in the affairs of State institutions and direct their expenditures, all relate to institutions over which the legislature has control. The Agricultural College and the University of Michigan are constitutionally immune from such legislation. The legislature has no control over them.

General supervisory control was not a meaningless term with the legislature. As Justice WIEST points out, it had been applied in other appropriation acts of the same session. It was understood to mean that it conferred the right not only to control the expenditure of the money, but to direct the work for which the appropriation was made. It is evident that the legislature intended to confer just such power on the State administrative board as it assumed to exercise in relation to this appropriation. In doing so, it exceeds its powers. This being true, the question arises, Does the unconstitutional

provision of the statute nullify the whole act? To hold that it does, we must assume that the legislature would not have made the appropriation except for the fact that the money was to be expended under the general supervisory control of the State administrative board. The main purpose of the legislature was to grant an appropriation to the college to enable it to carry on its extension work in co-operation with the Federal authorities. A previous legislature had committed the State to that policy. The appropriation was made to support one of the most important activities of the college. In making it the legislature was but obeying the mandate of the Constitution that it should grant appropriations for the support of the college and its various activities (Art. 11, § 10, Const. 1909). It had become a fixed habit with this legislature to confer upon the administrative board general supervisory control over all appropriations. As has been heretofore pointed out, this appears from the various acts enacted at this same session. It is not reasonable to assume, therefore, that it intended the appropriation to fail if for any reason the State administrative board could not exercise a general supervisory control over its expenditure. As we have indicated, the appropriation was necessary to carry on the very important work of taking the college to the people. Its purpose was mainly to benefit those who could not reside at the college. The legislature did not want this work to fail; it knew that an appropriation was necessary if it were to be continued. The main purpose was the appropriation. The supervisory control was but incidental, due to the legislative policy. In these circumstances, we think that the legislature did not intend the appropriation to fail and that the attempt to confer unconstitutional authority on the State administrative board did not nullify the balance of the act. See *State Board of Agriculture* v. *Auditor General,* 180 Mich. 349; *Moreland* v. *Millen,* 126 Mich. 381.

It follows that the State board of agriculture is entitled to the appropriation subject to the condition that it shall be used for the purpose specified. It is the undoubted right of the administrative board to see that the condition is complied with. We understand that the plaintiff is willing to accept the appropriation on these terms. If so, the money should be paid.

It has been suggested that only by following the fund into the hands of the board of agriculture can the administrative board compel a compliance with the condition as to the manner of its expenditure. As we have pointed out, when the money appropriated passes into the hands of the State board of agriculture, it becomes college property, and is thereafter under the exclusive control of that board, but must be used for the purpose for which it was granted. The proper method of compelling a compliance with the condition that

the money shall be expended for the purpose specified will readily suggest itself to the administrative board and its legal advisor.

In view of some statements that have been made, we are led to say that in the action it has taken with reference to the affairs of the college, the State administrative board has been but following out the directions of the legislature in the belief that the greatest efficiency will follow the supervision by the State of all appropriations. But, as we have said, the system adopted, which has apparently produced most satisfactory results when applied to other State institutions, cannot be followed into the business management of the Agricultural College. The Constitution forbids it. The history of the struggles of the University of Michigan for this constitutional policy, under which it has attained its present high standing, may be read in *Sterling* v. *Regents of University, supra,* and cases there cited. The same policy has been adopted for the Agricultural College, and in upholding it we are consistently following the Constitution as interpreted by all of the previous decisions of this court. For these reasons I concur in the result reached by Mr. Justice MOORE.

The writ of mandamus will issue to the auditor general, but without costs.

CLARK, C. J., and SHARPE and STEERE, JJ., concurred with McDONALD, J.

MOORE, J. I agree with Justice McDONALD in his construction of the constitutional provision he quotes and the limitation it puts upon the power of the legislature and the administrative board.

WIEST, J. *(dissenting).* We are not in accord with the opinion prepared by Mr. Justice MOORE.

The State board of agriculture is a constitutional body corporate. It is the duty of the legislature to maintain the State Agricultural College. Agricultural College funds, designated as such in the Constitution, are wholly under control of the State board of agriculture. Biennial legislative appropriations are not agricultural funds designated as such in the Constitution. The constitutional mandate to the legislature to support the Agricultural College does not mean that, in the matter of appropriations, the legislature shall have no voice in the amounts and expenditure thereof. The Constitution fixes no sum to be appropriated by the legislature for support of the Agricultural College, but leaves the subject to the legislature from session to session in recognition of the fact that the legislature controls the public purse strings. The Constitution, in making the State

board of agriculture a body corporate, has not raised the board above the legislative power of the State in the matter of the expenditure of public funds. There is another mandate in the Constitution:

"No money shall be paid out of the State treasury except in pursuance of appropriations made by law." Constitution, Art. 10, § 16.

Funds vested in the college by the Constitution are beyond legislative regulation or control. But what the legislature may grant, by way of an appropriation, goes only as given, may be upon condition, and provide for the intervention of a State supervising finance agency with delegated power to be exercised respecting the expenditure. To set aside money in the treasury for a specified purpose does not *eo instante* vest the same in any body. The system of State finance, payment of money and accounting therefor by disbursing officers forbids. The right to the money is measured by the terms of the legislative grant thereof and such terms may impress upon the grant the condition that it shall be devoted to a specific purpose and its expenditure made subject to the general supervisory control of the State administrative board. The right of the legislature to appropriate, with or without condition, beyond general specification of object, is beyond question. If with condition attached, then the only question is the extent and nature of the condition.

In the appropriation act the legislature invoked in comprehensive language the powers theretofore granted the State administrative board. This it had an undoubted right to do. The distinction between an appropriation and its disbursement must be kept in mind. Disbursement of necessity comes after appropriation; official acts intervene. The State administrative board is under legislative mandate to exercise supervisory control over the disbursement of the appropriation in question. The legislature always has had power to ascertain whether an appropriation has been expended by an administrative body for the purpose for which it was made. The legislature also has power, and manifestly the duty, to fix the purpose for which an appropriation may be expended. Coupled with this power is the right to delegate to an administrative body the right of supervision over the acts of a disbursing body. The power to grant or withhold carries the power to grant on condition, specification of object, delegation of power of supervisory control in a governmental agency and accounting for expenditures.

There is come a time in State finance when a central power, created for the purpose of exercising supervisory control over the expenditures of appropriations, is deemed advisable, and the vesting

of this power in the State administrative board, and the command that it be exercised, are not meaningless words. The administrative board was created to stand between appropriations and use thereof, when so invoked by the legislature.

Act No. 2, Pub. Acts 1921 (Comp. Laws Supp. 1922, § 172 [1-9]), created the State administrative board to promote the efficiency of the government of the State and vested in that board, among other things, the power and functions of the State budget commission created by Act No. 98, Pub. Acts 1919 (Comp. Laws Supp. 1922, § 277). The condition attached to the appropriation "subject to the general supervisory control of the State administrative board," is not meaningless if we indulge in a little circumspection. Why designate the State administrative board and invoke its office between the grant of the appropriation and the expenditure thereof? The answer is in section 3 of the State administrative board act:

"The State administrative board shall exercise general supervisory control over the functions and activities of all administrative departments, boards, commissioners, and officers of the State, and of all State institutions. Said board may in its discretion intervene in any matter touching such functions and activities and may by resolution or order, advise or direct the department, board, commission, officer or institution concerned as to the manner in which the function or other activity shall be performed, and may order an interchange or transfer of employees between departments, boards, commissions and State institutions when necessary. It is hereby made the duty of each and every official and employee connected with any administrative department, office or institution of the State to follow the direction or order so given; and to perform such services in the carrying out of the purposes and intent of this act as may be required by the board. Failure so to do shall be deemed to constitute malfeasance in office and shall be sufficient cause for removal. In no case shall any order issue under this act without the written approval of the governor."

General supervisory control over the expenditure of the appropriation means something more than mere permission to look on without a frown. It means that the legislature invoked all the applicable powers vested in the State administrative board in supervision and control of the expenditure of the appropriation, or it means absolutely nothing. It is found in many other appropriation acts of the same session and indicates a pronounced legislative policy. It is in line with modern State finance and centers supervision, control and

responsibility, and notes a departure from the old idea of the sufficiency of legislative disapproval of method of an expenditure of an appropriation disclosed only in an accounting. This is clearly demonstrated in the act creating the State administrative board and in vesting that board with the power and functions of the State budget commission.

In creating the State budget commission the legislature declared:

"The term 'budget system,' established by this act, shall be construed to be a systematic plan of ascertaining and meeting the financial needs of the several departments, institutions, boards, commissions and offices of the State government, and of the controlling State funds."

The legislature imposed a responsibility upon the administrative board and this cannot be met if my Brother's opinion prevails. The power under the budget commission act gives the State administrative board recommendatory supervision over appropriations asked for, and the State administrative board act gives general supervisory control over the expenditure of the appropriation granted.

The merits of the issue between the State board of agriculture and the State administrative board cannot be reviewed by this court. If the law vests in the State administrative board general supervisory control over the appropriation, and it has exercised such control, and the State agricultural board feels aggrieved thereby, the remedy is by appeal to the legislative and not to the judicial power.

We have passed upon the law involved; we find the State administrative board exercising power in the premises granted by the legislature. We cannot supervise the supervision exercised.

The writ should be denied.

BIRD and FELLOWS, JJ., concurred with WIEST, J.

BIRD, J. *(dissenting).* I am in full accord with the opinion of Mr. Justice WIEST in this matter, but desire to say a word on the constitutional question raised since that opinion was written. I think every thoughtful man must concede that the legislature could have refused to make this particular appropriation and, if it had, no legal complaint could have been made. If, then, the legislature was in the position where it could give or withhold the appropriation as it saw fit, it was in no different position than a private donor might be who chooses to give the college a donation of like amount with the condition that the Detroit Trust Company should have supervisory

control to see that the terms of the donation were complied with. Had some public-spirited citizen made such a donation under the condition indicated, could it be said that the condition was unconstitutional? The private citizen and the legislature stand in the same position, either could give or withhold. If this be so, then either had a right to annex a condition, and if the gift is accepted by the college it must take it subject to the condition and comply therewith. The only way the college could avoid compliance with the condition would be to refuse the gift. To reach any other conclusion, it must be said that the legislature was under obligation to make this particular donation without condition.

It is argued that the legislature had a constitutional duty to support and maintain the college. Granting this to be so, does it follow that, because it is under a constitutional obligation to maintain the college, it may not make a particular gift upon condition and appoint some agency to see that the condition is complied with? It is indeed a strange process of reasoning to say that the legislature may give or withhold but, if it does give upon condition, that the condition is unconstitutional.

This proposition was very sensibly disposed of in *Weinberg* v. *Regents of University,* 97 Mich. 246, 254, where it was said:

"In making appropriations for its support, the legislature may attach any conditions it may deem expedient and wise, and the regents cannot receive the appropriation without complying with the conditions."

Notwithstanding this court made that statement in the year 1893, it is argued in 1924 that it is of no account, that the college may reach out and lay hold of an appropriation, given upon condition, and ignore the condition on the plea that it is unconstitutional. If this argument be sound, then it must be assumed that the legislature would have made the appropriation regardless of the condition. I do not believe this court is in a position to so hold.

It was said in *Warren* v. *Mayor, etc., of Charlestown,* 2 Gray (Mass.), 84, where the question was discussed:

"If they (the parts of the act) are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional and connected must fall with them."

"If the void part of the act is the compensation for or the inducement to the valid portion, so that, looking at the whole act, it is reasonably clear that the legislative body would not have enacted the valid portion alone, then the whole act will be held inoperative and void. It is not necessary that the invalid portion of an act of the legislature should have operated as the sole inducement to the passage of the law to render the same void. It will have that effect if the void part to any extent influenced the legislature in passing the statute." 1 Lewis' Sutherland on Statutory Construction (2d Ed.), § 303.

See, also, Cooley's Constitutional Limitations (6th Ed.), p. 211; *People, ex rel. Attorney General,* v. *Sperry & Hutchinson Co.,* 197 Mich. 532 (L. R. A. 1918A, 797).

If it can be said, by any stretch of the imagination, that the condition annexed to the appropriation is void because unconstitutional, then, I insist, the whole act must fail.

FELLOWS, J., concurred with BIRD, J.

Bauer v. State Board of Agriculture

164 Mich. 415, 416-19; 129 N. W. 713 (1911)

BLAIR, J. Upon the petition of the relator an order to show cause was made by this court, directed to the respondent, the State board of agriculture, requiring it to show cause why the writ of mandamus should not issue to compel it to—

"Abrogate the contract heretofore made or attempted to be made with the United States government, whereby it, the said State board of agriculture, has agreed to furnish quarters for a United States post office at East Lansing, Mich. (*b*) That it cease from construction and expending moneys for construction of quarters for a United States post office at East Lansing, Mich. (*c*) That it cease from furnishing quarters for a United States post office at East Lansing, Mich., within such reasonable time as to this court shall seem reasonable and expedient."

The interest of relator, as disclosed by the record, is that he is a citizen and a taxpayer of the county of Ingham, doing a mercantile business in the city of East Lansing in a building of which he has a lease to and including August 31, 1916; that there was an agreement

entered into with W. R. Hinman, assistant superintendent of the post office department at Washington, having charge of buildings and leases, to locate the post office at East Lansing in relator's leased building; that this agreement was not executed and delivered by the post office department because of the intervention of the respondent, through its secretary, which resulted in a contract between the respondent and the post office department of the United States, whereby the respondent agreed to furnish quarters and equipment for the said post office, to be located upon the college grounds, for an annual rental of $600.

Relator contends:

"The law creating the State agricultural college and the State board of agriculture contains no provision by which it can be inferred that the State board of agriculture is clothed with power to engage in the business of building for and furnishing quarters to the United States for a post office any more than to a private individual for his private business, nor does such right arise by implication from any of the powers granted said board."

We are of the opinion that this case is ruled by *Sterling* v. *Regents of University,* 110 Mich. 369 (68 N. W. 253, 34 L. R. A. 150). In the Constitution of 1909 two new sections, 7 and 8, relative to the State board of agriculture, were added to article 11, the effect of which was to make the State board of agriculture a constitutional board elected by the people instead of a statutory board appointed by the governor, as it had existed since 1861, and to define the principal powers and duties of the board in the Constitution itself. It is apparent from the debates in the constitutional convention, as well as from the language of sections 7 and 8, that it was the intention to place the State board of agriculture and the agricultural college upon the same footing as the board of regents and the university. Among other expressions of the delegates to the convention, we quote the following:

"*Mr. Gore:* Mr. President, the last section of this proposal which was defeated yesterday, I have been informed, was defeated under some misapprehension. I know that I was laboring under an apprehension that there was very little, if any, demand for that portion of the proposal as contained in the last paragraph. I am advised that the friends of the agricultural college all over this State are very much interested in that portion of the proposal becoming a part of the revised Constitution. It is obvious that the requirements of the agricultural college are on a par with the university so far as its

management is concerned. There is no doubt that the friends of that college, the particular friends I now refer to, all over the State, will take such an interest in its welfare that it can properly be intrusted to a board of regents in the same manner as the university is now conducted. I therefore trust that this proposal will meet with the favorable judgment of the convention."

"*Mr. W. E. Brown:* The words 'members of the board' were stricken out of the tentative draft on page 53, line 82, and the words 'State board of agriculture' were substituted in their place. And in the same line the words 'may be' were stricken out and the words 'often as' were substituted in their place, so that the section follows the wording of the section with reference to the regents. In line 86 of the tentative draft, the word 'State,' and in line 87, the words 'of agriculture' were stricken out, and at the end of the section these words were added, 'and shall perform such other duties as may be prescribed by law.' We ascertained after the section was passed that there were other duties besides these that the law prescribes to be performed by the board of agriculture, and we took it that it was your intention that the entire duties as prescribed by law should apply to this board until such time as its duties might be changed."

The addition to the last clause of section 8 of the words, "and shall perform such other duties as may be prescribed by law," makes it clear that the duties to be prescribed by the legislature are other than "the general supervision of the college and the direction and control of all agricultural college funds," as to which, as we held in *Sterling* v. *Regents of University, supra,* the State board of agriculture has exclusive supervision and control. We do not intend to hold that an act of the board might not be so subversive of the purposes for which the board was created as to warrant the intervention of the courts, but we do not think this record presents such a case, nor do we intend to hold that the legislature may not make appropriations for specific objects or attach conditions which would be binding upon the State board of agriculture in case they accepted the appropriations; but we do hold that as to the general funds appropriated for the general purposes of the agricultural college, the board has the exclusive control and direction, to the same extent that we held such power was possessed by the board of regents in the *Sterling Case* above referred to.

The writ is denied, but without costs.

OSTRANDER, C. J., and McALVAY, J., concurred with BLAIR, J.

MOORE, J. I concur in the result, but do not regard mandamus as the proper remedy.

HOOKER, BROOKE, and STONE, JJ., concurred with MOORE, J.

BIRD, J. I concur in the result on the sole ground that mandamus is not the proper remedy.

Agler v. Michigan Agricultural College

181 Mich. 559, 559-63; 148 N. W. 341 (1914)

The applicant, who is a tinner and roofer by trade, was injured, on April 18, 1913, by falling from a ladder while making repairs on the buildings of the respondent. A claim was presented against the respondent under the workmen's compensation law of 1912, and the case is brought here by certiorari to the industrial accident board to review an order affirming the award made to the applicant by an arbitration committee, in accordance with the provisions of the act. Neither the Michigan Agricultural College nor the State board of agriculture, which has general supervision of the college and direction and control of all its funds, elected to come under the provisions of the workmen's compensation act. No mention is made in the act of either of the constitutional boards; the board of regents of the University and the State board of agriculture, and the question here is, Does the act bring arbitrarily under its provisions the State board of agriculture, which is a board created by the Constitution (sections 7 and 8, art. 11, Const.)? This involves a consideration of the following sections of the act:

"PART 1.

"SEC. 5. The following shall constitute employers subject to the provisions of this act:

"1. The State and each county, city, township, incorporated village and school district therein;

"2. Every person, firm and private corporation, including any public service corporation, who has any person in service under any contract of hire, express or implied, oral or written, and who, at or prior to the time of the accident to the employee for which compensation under this act may be claimed, shall in the manner provided in the next section, have elected to become subject to the provisions of

this act, and who shall not, prior to such accident, have effected a withdrawal of such election, in the manner provided in the next section. * * *

"SEC. 7. The term 'employee' as used in this act shall be construed to mean:

"1. Every person in the service of the State, or of any county, city, township, incorporated village or school district therein, under any appointment, or contract of hire, express or implied, oral or written, except any official of the State, or of any county, city, township, incorporated village or school district therein: *Provided,* that one employed by a contractor who has contracted with a county, city, township, incorporated village, school district or the State, through its representatives, shall not be considered an employee of the State, county, city, township, incorporated village or school district which made the contract;

"2. Every person in the service of another under any contract of hire, express or implied, oral or written, including aliens, and also including minors who are legally permitted to work under the laws of the State who, for the purposes of this act, shall be considered the same and have the same power to contract as adult employees, but not including any person whose employment is but casual or is not in the usual course of the trade, business, profession or occupation of his employer."

In the stipulation filed in this case the following appears:

"It is agreed that the draft of the workmen's compensation act as prepared by the commission and as presented to the legislature contained a period after the word 'contract' at the end of the first subdivision of paragraph 7 of part 1."

KUHN, J. *(after stating the facts).* By virtue of the Constitution of 1909, the State board of agriculture was put on the same plane with the board of regents of the University of Michigan. It has been established beyond question by decisions of this court that neither the legislature nor any officer or board of this State may interfere with the control and management of the affairs and property of the University, although in making appropriations for its support the legislature may attach any conditions it may deem expedient and wise, and the appropriation cannot be received without complying with the conditions. *People, ex rel. Drake,* v. *Regents,* 4 Mich. 98; *Weinberg* v. *Regents,* 97 Mich. 246 (56 N. W. 605); *Sterling* v. *Regents,* 110 Mich. 369 (68 N. W. 253; 34 L. R. A. 150); *Bauer* v. *State Board of Agriculture,* 164 Mich. 415 (129 N. W. 713); *Board of*

Regents v. *Auditor General,* 167 Mich. 444 (132 N. W. 1037).

Section 5, part 1, of the workmen's compensation law (2 How. Stat. [2d Ed.] § 3939), expressly enumerates the State and counties, cities and villages, townships and school districts. Neither of the constitutional boards is mentioned. In the case of *Weinberg* v. *Regents, supra,* there was under consideration an act of the legislature which provided:

"That when public buildings, or other public works or improvements are to be built, repaired or ornamented under contract, at the expense of this State, or of any county, city, village, township, or school district thereof, it shall be the duty of the board of officers or agents contracting on behalf of the State, county, city, village, township, or school district, to require sufficient security by bond, for the payment by the contractor, and all subcontractors, for all labor performed, or materials furnished in the erection, repairing or ornamenting of such building, works or improvements." Act No. 45, Pub. Acts 1885.

Mr. Justice GRANT, in writing the majority opinion said, 97 Mich., at pages 253, 254 (56 N. W. 607):

"The regents make no contracts on behalf of the State, but solely on behalf of and for the benefit of the University. All the other public corporations mentioned in the Constitution, which have occasion to erect public buildings or to make public improvements, are expressly included in this statute. *'Expressio unius est exclusio alterius.'* It expressly enumerates the State, counties, cities, villages, townships, and school districts. If the University were under the control and management of the legislature, it would undoubtedly come within this statute, as do the Agricultural College, Normal School, State Public School, asylums, prisons, reform schools, houses of correction, etc. But the general supervision of the University is, by the Constitution, vested in the regents. * * *

"The University is the property of the people of the State, and in this sense is State property so as to be exempt from taxation. *Auditor General* v. *Regents,* 83 Mich. 467 [47 N. W. 440, 10 L. R. A. 376]. But the people, who are the corporators of this institution of learning, have, by their Constitution, conferred the entire control and management of its affairs and property upon the corporation designated as 'the Regents of the University of Michigan,' and have thereby excluded all departments of the State government from any interference therewith. The fact that it is State property does not bring the regents within the purview of the statute. The people may, by their Constitution, place any of its institutions or property beyond the control of the legislature."

The contract of employment in the instant case was made with the State board of agriculture, not on behalf of the State, but primarily for the benefit of the Agricultural College. For the reasons stated by Mr. Justice GRANT in the *Weinberg Case,* we must conclude that it cannot be said that the State board of agriculture or the regents of the University are brought under the workmen's compensation act by virtue of said section 5 of part 1 of the act, and it cannot be said that the applicant was an employee of the State within the meaning of said law. The conclusion must therefore follow that the respondent was not within the list of employers who come under the provisions of the law of 1912 automatically; and, inasmuch as the respondent has made no election to come thereunder, the applicant is not entitled to recover in this proceeding.

Because of this conclusion, it is unnecessary to discuss the other interesting and well-argued questions raised in briefs of counsel. The decision of the industrial accident board is reversed, and the claim of the applicant is disallowed.

McALVAY, C. J., and BROOKE, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

Peters v. Michigan State College

320 Mich. 243, 244-63; 30 N. W. 2d 854 (1948)

REID, J. *(for affirmance).* On April 23, 1946, plaintiff Robert W. Peters filed an application for hearing and adjustment of claim as an employee of Michigan State College, which is under the control and general supervision of the State board of agriculture, which board is hereinafter referred to as defendant, alleging that he suffered a personal injury on February 12, 1946, which arose out of and in the course of his employment.

On May 4, 1946, defendant filed a motion to dismiss plaintiff's application for hearing and adjustment of claim on the ground that defendant, not having elected to become subject to the Michigan workmen's compensation act and amendments thereto, was not subject to the provisions of said act. A deputy commissioner entered an order denying the motion.

On July 10, 1946, the defendant applied to the compensation commission of the department of labor and industry for review of claim. The commission on January 9, 1947, pursuant to opinion simultaneously filed, entered its order denying the defendant's

motion, and remanded the case to a deputy commissioner to be heard on its merits. From this order (on leave being granted) defendant appeals.

The sole issue presented is whether the defendant, a constitutional corporation, is subject to the provisions of the Michigan workmen's compensation act, as amended.

Part 1, § 2 of the act, 2 Comp. Laws 1929, § 8408, as amended by Act No. 245, Pub. Acts 1943 (Comp. Laws Supp. 1945, § 8408, Stat. Ann. 1947 Cum. Supp. § 17.142), in part reads as follows:

"SEC. 2. On and after the effective date of this section, every employer, public and private, and every employee, unless herein otherwise specifically provided, shall be subject to the provisions of this act and shall be bound thereby."

Part 1, § 5, of the act, 2 Comp. Laws 1929, § 8411, as amended by Act No. 245, Pub. Acts 1943 (Comp. Laws Supp. 1945, § 8411, Stat. Ann. 1947 Cum. Supp. § 17.145), reads as follows:

"SEC. 5. The following shall constitute employers subject to the provisions of this act:

"*Public* 1. The State, and each county, city, township, incorporated village and school district therein, and each incorporated public board or public commission in this State authorized by law to hold property and to sue or be sued generally;

"*Private* 2. Every person, firm and private corporation, including any public service corporation, who has any person in service under any contract of hire, express or implied, oral or written."

The defendant is an "incorporated public board" within the meaning of section 5 above quoted.

Sections 7 and 8, art. 11, State Constitution 1908, are as follows:

"SEC. 7. There shall be elected on the first Monday in April, nineteen hundred nine, a State board of agriculture to consist of six members, two of whom shall hold the office for two years, two for four years and two for six years. At every regular biennial spring election thereafter, there shall be elected two members whose term of office shall be six years. The members thus elected and their successors in office shall be a body corporate to be known as 'The State Board of Agriculture.'

"SEC. 8. The State board of agriculture shall, as often as necessary, elect a president of the agricultural college, who shall be ex-officio a member of the board with the privilege of speaking but not of voting. He shall preside at the meetings of the board and be the principal executive officer of the college. The board shall have the general supervision of the college, and the direction and control of all agricultural college funds; and shall perform such other duties as may be prescribed by law."

We note that in section 7, above cited, the defendant is designated a body corporate, hence our conclusion that defendant is an incorporated public board.

The sole remaining question is whether it is competent for the legislature to prescribe that the defendant shall be subject to the workmen's compensation act.

Defendant claims that the provision in section 8, above cited, that the board (defendant) shall have the general supervision of the college and the direction and *control* of all *agricultural college funds,* prevents the legislature from requiring the board to expend any of the agricultural college funds for workmen's compensation.

Defendant cites *Robinson* v. *Washtenaw Circuit Judge,* 228 Mich. 225, which involved malpractice suits brought against the regents of the University of Michigan and a surgeon employed in the university hospital. The suits had been dismissed in circuit court and plaintiffs in those suits brought mandamus to compel the circuit judge to set aside his orders of dismissal. The board of regents (defendant in the original suits) had claimed immunity on the ground that the university hospital operated by the regents is a charitable institution. The opinion in the case says, page 227, that that ground is the only objection regarded as calling for serious consideration. However, at the conclusion of the opinion on page 230 we say, "On the case stated in plaintiffs' declarations we think denial of liability as to the regents could safely be rested on either ground," referring to the words, "State instrumentalities, as well as charities," in the immediately preceding excerpt quoted in that opinion. In other words, we held that the board of regents was immune both on the ground of being a State instrumentality and on the ground of their hospital being a charitable or eleemosynary institution.

Immunity of defendant in the case at bar as a State governmental agency is not provided for in our State Constitution and the legislature by force of the words, "incorporated public board" has included defendant as an employer subject to the workmen's compensation act, thus to that extent depriving defendant of its immunity as an instrumentality of government. See *Benson* v. *State Hospital Com-*

The *Robinson Case, supra,* does not in any wise discuss the meaning and effect of the constitutional clause giving defendant control of the funds of the college and the decision in that case does not aid the defendant in the case at bar.

Under the workmen's compensation act as originally enacted by Act No. 10, Pub. Acts 1912 (1st Ex. Sess.), the private employer was at liberty to accept or not to accept the provisions of the act, but the State and political subdivisions thereof in general (with certain exceptions) were included as subject to the act without their consent.

In part 1, § 5, of the act, as amended by Act No. 50, Pub. Acts 1913, effective August 14, 1913 (2 Comp. Laws 1929, § 8411 [Stat. Ann. § 17.145]), under the heading, "*Public.* 1.," incorporated public boards are made subject to the provisions of the act. Such incorporated public boards were not subject to nor mentioned in the act as originally enacted (Act No. 10, Pub. Acts 1912 [1st Ex. Sess.]), above referred to. In the case of *Agler* v. *Michigan Agricultural College,* 181 Mich. 559 (5 N. C. C. A. 897), the employee was injured April 18, 1913, which was before the act of 1913, *supra,* was effective; hence in the *Agler Case* we say, page 563, that "the respondent was not within the list of employers who come under the provisions of the law of 1912 automatically." Defendant was not within such list at the time Agler received his injuries. The words just quoted must be construed to apply to the situation at the time of the occurrence of the supposed liability. The question before the Court in the case at bar was not decided in the *Agler Case.*

The case of *State Board of Agriculture* v. *Auditor General,* 226 Mich. 417, was brought in consequence of an effort on the part of the State administrative board to control the expenditures of the plaintiff State board of agriculture (the same board which is defendant in the case at bar) under an act of the legislature granting the State administrative board such powers. If the administrative board had been upheld in its contention, it would have exercised control over the educational activities of the college. In that case we held that the State administrative board could exercise no control over the funds of the college, such control being given to plaintiff board under the provisions of the Constitution 1908, art. 11, §§ 7, 8 (hereinbefore cited in this opinion). However, the provision of the Constitution giving the State board of agriculture sole control of the funds of the college does not generally exempt the said board from the great body of general laws of this State. It is to be noted that section 8 of article 11 of the State Constitution above quoted closes with the words, referring to the State board of agriculture, "shall perform such other duties as may be prescribed by law."

We have heretofore had occasion to pass upon the constitutionality of the workmen's compensation act as to some one or other of its various provisions in several cases, among which are the following: *Mackin* v. *Detroit-Timkin Axle Co.*, 187 Mich. 8; *Wood* v. *City of Detroit,* 188 Mich. 547 (L. R. A. 1916 C, 388); *Grand Rapids Lumber Co.* v. *Blair,* 190 Mich. 518; *Wall* v. *Studebaker Corporation,* 219 Mich. 434; *American Life Insurance Co.* v. *Balmer,* 238 Mich. 580. In none of these cases has the act been found unconstitutional as to any phase of the act brought under consideration therein.

We have heretofore decided in the *Mackin Case, supra,* that the title of the act in question fairly expressed its purpose.

The purpose of the workmen's compensation act partakes of the nature of the exercise of police power. It is aimed at promoting the welfare of the people of the State. See *Wallace* v. *Regents of University of California,* 75 Cal. App. 274 (242 Pac. 892); *Casey* v. *Hansen,* 238 Iowa, 62 (26 N. W. [2d] 50).

"The sovereign power of the State includes protection of the safety, health, morals, prosperity, comfort, convenience and *welfare* of the public, or any substantial part of the public." (Italics supplied.) *Cady* v. *City of Detroit,* 289 Mich. 499, 504, 505.

The defendant corporation is not vested by the State Constitution with any power of a police nature. Neither is the defendant corporation vested with any power to regulate the general welfare of the people of this State. It is for the legislature to exercise such powers.

As amended in 1920, article 5, § 29, of the State Constitution provides as follows:

"SEC. 29. The legislature shall have power to enact laws relative to the hours and conditions under which men, women and children may be employed."

Before the amendment of 1920 (which added the word "men" in the above section), we had decided in *Wood* v. *City of Detroit,* 188 Mich. 547 (L. R. A. 1916C, 388), that the workmen's compensation act was not violative of the State Constitution even as respects liability for death of an employee of a municipality through its public lighting commission, notwithstanding rights of local self-government given by the Constitution to municipalities. In that case we said, page 560,

"Whether it [the workmen's compensation act] is or is not denominated a police regulation, municipal corporations are, for the

purpose of carrying out such a measure, subject to legislative control."

We find that the workmen's compensation act is a valid constitutional exercise of the power of the legislature even when it makes necessary the expenditure of agricultural college funds in the compensation of employees under the terms and within the provisions of the workmen's compensation act.

The act is approved as a piece of legislation aimed not at the defendant alone, nor against any of the activities of the defendant of a nature peculiar to defendant. The act is of a broad scope addressed to the subject of the liability of employers in broad fields of employment. The workmen's compensation act does not undertake to change or disturb the educational activities of the defendant board.

The control of State college funds must be considered as given to defendant for the purposes of the particular and peculiar educational activities of the State college, not for the purpose of disturbing the general relationship in this State of employer and employee, nor evading laws enacted to promote the general welfare of the people of this State. Article 11, § 8, above cited, is not to be construed as withholding from the legislature the authority to make the defendant board liable and subject to the entire workmen's compensation act in question.

The order of the department remanding the claim for hearing on its merits is affirmed. No costs are allowed, a matter of public importance being involved.

BUTZEL, J. *(concurring).* I concur on the ground that the workmen's compensation act is a valid exercise of the police power. BUSHNELL, C. J., and SHARPE, J., concurred with BUTZEL, J.

DETHMERS, J. *(for reversal).* My attitude toward the opinion of Mr. Justice REID is well expressed in the language employed by the majority of this Court in commenting on the dissenting opinion of Mr. Justice WIEST in *State Board of Agriculture* v. *Auditor General,* 226 Mich. 417, in which Mr. Justice McDONALD, speaking for the majority of the Court, said:

"I am in entire disagreement with the conclusions reached by Mr. Justice WIEST in reference to the powers and duties of the State board of agriculture. If his opinion is to prevail we will have completely overturned the well settled policy of the State relative to the management and control of the university and of the agricultural college. These institutions of learning are very close to the hearts of

the people of Michigan. They have made of them the most unique organizations known to the law, in this, that they are constitutional corporations created for the purpose of independently discharging State functions. The people are themselves the incorporators; the boards that control them are responsible only to the people who elect them; they are independent of every other department of State government."

To the statement contained in Mr. Justice REID's opinion that plaintiff suffered a personal injury which arose out of and in the course of his employment by defendant should be added the further fact that it is not disputed that such employment and the duties which plaintiff was performing at the time of his injury were within the scope and in furtherance of college operations. May the legislature, as relates to such employment, prescribe that the defendant shall be subject to the provisions of the workmen's compensation act? I think not.

As stated in my Brother's opinion, the Michigan Constitution of 1908, art. 11, § 8, provides that the board "shall have the general supervision of the college, and the direction and control of all agricultural college funds." Plaintiff's work, at the time he became injured, was being performed squarely within the field over which the defendant board is given supervision. Furthermore, to require payment of compensation in such case directly affects the defendant's constitutionally-conferred power of direction and control over all agricultural college funds. The constitutional grant to defendant board of *supervision, direction* and *control* in these respects, must be deemed absolute to the exclusion therefrom of interference by the legislature. *Sterling* v. *Regents of University of Michigan,* 110 Mich. 369 (34 L. R. A. 150); *Weinberg* v. *Regents of University of Michigan,* 97 Mich. 246; *Bauer* v. *State Board of Agriculture,* 164 Mich. 415; *State Board of Agriculture* v. *Auditor General, supra.*

My Brother's opinion cites no decisions of this Court as authority for the proposition that the legislature may exercise control directly or indirectly over those fields as to which the regents of the university or the State board of agriculture are given the powers of supervision by the Constitution. This is not because the question has not heretofore been considered by this Court. Our decisions on the subject are numerous, ranging from shortly after the grant of powers to the board of regents by the Constitution of 1850 until recent times. Through them all runs a uniform thread of authority to the effect that the fields over which the Constitution delegates supervisory powers to the regents or board of agriculture are not to be invaded by the legislature. A review of these cases is essential here.

In *People, ex rel. Drake,* v. *Regents of the University,* 4 Mich. 98, this Court denied an application for mandamus to compel the regents to comply with a statute enacted by the legislature requiring appointment by the regents of a professor of homeopathy. In response to the claim that the statute was unconstitutional because it constituted an invasion of the regents' constitutional powers, this Court said:

"We are compelled to recognize in this question what might well suggest doubts of the binding force of the law."

In *People* v. *Regents of the University,* 18 Mich. 469, like application for mandamus was made as in the case reported in 4 Mich. 98 and the application was not granted because a majority of the Court could not be convinced that "the legislature had power under the Constitution to exercise any such control over the regents, who are vested with the 'general supervision of the university, and the direction and control of all expenditures of the university interest fund' " (syllabus).

In *People, ex rel. Attorney General,* v. *Regents of the University,* 30 Mich. 473, like application received like treatment because the Court, as stated in its opinion, had not changed its previous views (clearly a reference to the last above cited case).

In *Weinberg* v. *Regents of the University of Michigan,* 97 Mich. 246, plaintiff brought suit against the regents to recover the value of materials furnished to a subcontractor in building the university hospital. Action was predicated upon a statute requiring public boards, officers or agents making contracts for the construction of public buildings to require security by bond for payment by the contractor and all subcontractors of all labor and material claims. The regents, in contracting for the building of the hospital, had required no such security by bond. A judgment for plaintiff in the court below was reversed, a majority of this Court holding that the statute in question did not control the regents. The majority opinion, in so holding, alluded to the fact that this Court had refused to compel the regents to comply with certain legislative acts in the three last above cited cases.

In *Sterling* v. *Regents of University of Michigan,* 110 Mich. 369 (34 L. R. A. 150), mandamus was sought to compel the regents to comply with an act of the legislature providing for removal of the homeopathic medical college from Ann Arbor to Detroit. The writ was denied on the authority of the *Weinberg Case* for the expressed reason that "the legislature has no control over the university or the board of regents." The opinion in this case contains an extended

analysis of the entire general question before us, including the history of the constitutional grant of powers to the regents, the reasons therefor, construction of the constitutional language employed for that purpose, and a review of the decisions thereon.

In *Bauer* v. *State Board of Agriculture,* 164 Mich. 415, wherein the power of the defendant board to expend funds of the college for the purpose of constructing a building for lease to the United States government for post office purposes was challenged, this Court, in upholding such power, held that the defendant board had exclusive control and direction of the general funds of the college appropriated for the general purposes of the college.

In *Board of Regents of the University of Michigan* v. *Auditor General,* 167 Mich. 444, we granted a writ of mandamus to compel the auditor general to issue a warrant upon the State treasurer for certain university expenditures after the auditor general had refused to issue it because the university had expended moneys in violation of the accounting laws of this State. The writ was granted on the ground "that the board of regents has independent control of the affairs of the university."

In *Agler* v. *Michigan Agricultural College,* 181 Mich. 559 (5 N. C. C. A. 897), discussed at greater length later in this opinion, we held that the defendant was not subject to the workmen's compensation act for the reasons stated in *Weinberg* v. *Regents of University of Michigan, supra.*

In *People for use of Regents of the University of Michigan* v. *Brooks,* 224 Mich. 45, involving condemnation proceedings for the use and benefit of the regents, we said:

"The 'board of regents' is a separate entity, independent of the State as to the management and control of the University."

State Board of Agriculture v. *Auditor General,* (syllabus 2) *supra,* reads as follows:

"The condition attached by Act No. 308, Pub. Acts 1923, that the money thereby appropriated to the State board of agriculture for the purpose of carrying on agricultural extension work in co-operation with the United States department of agriculture should be subject to the general supervisory control of the State administrative board, *held,* beyond the power of the legislature to impose, being in conflict with the Constitution (Art. 11, § 8) giving to the State board of agriculture exclusive control of all of its funds."

This concludes a summary review of all the Michigan decisions on the subject, disclosing the uniform position taken by this Court

over a period of almost 70 years, in unmistakably clear opposition to the views now expressed by Mr. Justice REID.

In *Agler* v. *Michigan Agricultural College, supra,* we said:

"By virtue of the Constitution of 1909 (1908), the State board of agriculture was put on the same plane with the board of regents of the university of Michigan. It has been established beyond question by decisions of this Court that neither the legislature nor any officer or board of this State may interfere with the control and management of the affairs and property of the university."

From this quotation it is clear that all which this Court has heretofore said concerning the independence of the board of regents of the university applies with equal force and effect to the State board of agriculture under its present constitutional powers.

I am not in accord with my Brother's analysis of the *Agler Case.* In that case, we said, in part, as follows:

"For the reasons stated by Mr. Justice GRANT in the *Weinberg Case,* we must conclude that it cannot be said that the State board of agriculture or the regents of the university are brought under the workmen's compensation act."

The reasons stated by Mr. Justice GRANT in the *Weinberg Case,* and quoted in the *Agler Case,* are as follows:

" 'If the university were under the control and management of the legislature, it would undoubtedly come within this statute, as do the agricultural college, normal school, State public school, asylums, prisons, reform schools, houses of correction, et cetera. But the general supervision of the university is, by the Constitution, vested in the regents. * * *

" 'The university is the property of the people of the State, and in this sense is State property so as to be exempt from taxation. *Auditor General* v. *Regents of the University of Michigan,* 83 Mich. 467 (10 L. R. A. 376). But the people, who are the corporators of this institution of learning, have, by their Constitution, conferred the entire control and management of its affairs and property upon the corporation designated as "the Regents of the University of Michigan," and have thereby excluded all departments of the State government from any interference therewith. The fact that it is State property does not bring the regents within the purview of the statute. The people may, by their Constitution, place any of its institutions or property beyond the control of the legislature.' "

This language from the *Weinberg Case* I deem controlling here. In that case we also said "under the Constitution, the State cannot control the action of the regents."

In *Sterling* v. *Regents of University of Michigan, supra,* in commenting on the *Weinberg Case,* we said:

"We might with propriety rest our decision upon that case, and should be disposed to do so were it not for the urgent contention of the counsel on the part of the relator that that case does not apply. We are therefore constrained to state *some further reasons to show that the legislature has no control over the university or the board of regents.*

"(1) The board of regents and the legislature derive their power from the same supreme authority, namely, the Constitution. In so far as the powers of each are defined by that instrument, limitations are imposed, and a direct power conferred upon one necessarily excludes its existence in the other, in the absence of language showing the contrary intent. Neither the university nor the board of regents is mentioned in article 4, which defines the powers and duties of the legislature; nor in the article relating to the university and the board of regents is there any language which can be construed into conferring upon or reserving any control over that institution in the legislature. They are separate and distinct constitutional bodies, with the powers of the regents defined. By no rule of construction can it be held that either can encroach upon or exercise the powers conferred upon the other."

In *Board of Regents of the University* v. *Auditor General, supra,* we said:

"By the provisions of the Constitution of 1850, repeated in the new Constitution of 1909 (1908), the board of regents is made the highest form of juristic person known to the law, a constitutional corporation of independent authority, which, within the scope of its functions, is co-ordinate with and equal to that of the legislature. By the old Constitution it is given 'direction and control of all expenditures from the university interest fund' (section 8, art. 13); and by the new Constitution 'general supervision of the university, and the direction and control of all expenditures from the university funds.' Section 5, art. 11. That the board of regents has independent control of the affairs of the university by authority of these constitutional provisions is well settled by former decisions of this Court."

In *State Board of Agriculture v. Auditor General,* supra, 423, we also said:

"The State board of agriculture stands on the same constitutional footing as the board of regents of the university. The progress which our university has made is due in large measure to the fact that the framers of the Constitution of 1850 wisely provided against legislative interference by placing its exclusive management in the hands of a constitutional board elected by the people. The underlying idea was that the best results would be attained by centering the responsibility in one body independent of the legislature and answerable only to the people. See *Sterling* v. *Regents of University of Michigan,* 110 Mich. 369, 382 (34 L. R. A. 150). For this reason the Constitution gave the regents the absolute management of the university, and the exclusive control of all funds received for its use. This Court has so declared in numerous decisions. *People, ex rel. Drake,* v. *Regents of the University,* 4 Mich. 98; *Weinberg* v. *Regents of the University of Michigan,* 97 Mich. 246, 254; *Sterling* v. *Regents of University of Michigan, supra; Board of Regents of the University* v. *Auditor General,* 167 Mich. 444."

Mr. Justice REID writes that the State Constitution does not provide for the "immunity of defendant * * * as a State governmental agency" and that the legislature by including defendant within the terms of the workmen's compensation act has deprived it of such immunity, citing *Benson* v. *State Hospital Commission,* 316 Mich. 66. The *Benson Case* is not in point inasmuch as it involved an action brought against the State under the court of claims act, Act No. 135, Pub. Acts 1939 (Comp. Laws Supp. 1940, § 13862-1 *et seq.,* Stat. Ann. 1940 Cum. Supp. § 27.3548[1] *et seq.*), and the construction of section 24 of that act as amended by Act No. 237, Pub. Acts 1943 (Comp. Laws Supp. 1943, § 13862-24, Stat. Ann. 1944 Cum. Supp. § 27.3548[24]), which waived the defense of governmental immunity in certain cases brought before the court of claims. That act never had application to claims for compensation brought before the compensation commission of the department of labor and industry. See *Rogers* v. *Kent Board of County Road Commissioners,* 319 Mich. 661, 668, decided on rehearing January 5, 1948. Furthermore, said section 24 of the act as thus amended in 1943 was expressly repealed by Act No. 87, § 2, Pub. Acts 1945 (Stat. Ann. 1947 Cum. Supp. § 27.3548[42]), and was no longer in effect when the cause of action in the instant case, if any, arose. The matter of governmental immunity is irrelevant here, the question before us being whether the legislature may, constitutionally, apply the workmen's compensation act to employees of the State board of agriculture.

Mr. Justice REID bases his conclusion that it is competent for the legislature to impose the provisions of the workmen's

compensation act upon the defendant on the theory that it constitutes an exercise of the police power vested solely in the legislature. The people, through the State Constitution, may vest the powers of State government or limit them where and as they will, consistent with the guarantee contained in article 4, § 4, of the Constitution of the United States. As said in *Clements* v. *McCabe,* 210 Mich. 207:

"It is beyond question that, when the people of this State adopted their Constitution, police power was placed in the legislature, *except as distinctly reserved or conferred elsewhere.*"

In the field of "general supervision of the college and the direction and control of all agricultural college funds," the people have "distinctly reserved or conferred elsewhere" than in the legislature the power to supervise, direct or control, and by the Constitution itself have barred legislative intrusion.

Wood v. *City of Detroit,* 188 Mich. 547 (L. R. A. 1916C, 388), relied upon by Mr. Justice REID, is distinguishable. There the defendant city claimed that its constitutionally conferred powers of local self-government were invaded by the legislature's attempt to apply the workmen's compensation act to certain of the city's employees. The Court, referring to article 8, § 21, of the State Constitution authorizing cities and villages to adopt and amend charters and pass laws and ordinances "subject to the Constitution *and general laws of this State,*" said:

"The Constitution of 1909 [1908] has pointed out the extent of the local powers and capacities of cities and villages * * * thus restricting the power of the legislature to grant or to deny to *particular communities* the enumerated capacities and powers, at will, but it has not * * * denied the power of the legislature to enact *general laws applicable to cities.*"

The situation in the instant case is different because the powers conferred upon the defendant board of agriculture by the Constitution are not expressly declared to be subject to the general laws of this State. We do not overlook the concluding words in article 11, § 8, that the defendant board "shall perform such other duties as may be prescribed by law." These words do not give the legislature the power to invade the field granted exclusively to the board of agriculture by the Constitution. As was said in *Bauer* v. *Board of Agriculture,* 164 Mich. 415:

"The addition to the last clause of section 8 of the words, 'and shall perform such other duties as may be prescribed by law,' makes

it clear that the duties to be prescribed by the legislature are other than 'the general supervision of the college and the direction and control of all agricultural college funds,' as to which as we held in *Sterling* v. *Regents of University of Michigan, supra,* the State board of agriculture has exclusive supervision and control."

Plaintiff is apprehensive as to certain suggested consequences were we to hold the defendant "immune from all legislation." Similarly, Mr. Justice REID writes, "However, the provision of the Constitution giving the State board of agriculture sole control of the funds of the college does not generally exempt the said board from the great body of general laws of this State." To ascribe such immunity to defendant or to hold it thus exempt is not necessary to decision for defendant on the facts before us. Suffice it to say that within the confines of the field of "general supervision of the college, and the direction and control of all agricultural college funds" it is the clear intent of the people, as expressed in the Constitution, that the defendant shall exercise exclusive authority therein without legislative intrusion.

I can only conclude that the employment of persons for the prosecution of college business, functions or operations is within defendant's exclusive supervision; that the payment of compensation, from college funds, in the event of personal injury arising out of and in the course of such employment involves an act of direction and control of agricultural college funds which, again, is within the exclusive power of the defendant board; that for these reasons it is not competent for the legislature to impose the workmen's compensation act on the defendant with respect to the type of employment here involved.

The order of the department denying defendant's motion to dismiss and setting the case for hearing on its merits should be set aside and the cause remanded to the department for entry of an order granting defendant's motion to dismiss plaintiff's application. No costs, a public question being involved.

BOYLES, NORTH, and CARR, JJ., concurred with DETHMERS, J.

Jackson Broadcasting & Television Corp. v. State Board of Agriculture

360 Mich. 481, 496-98, 499; 104 N. W. 2d 350 (1960)

DETHMERS, C. J. . . .

Plaintiff's bill seeks injunctive relief to prevent defendant from entering into a construction contract or expending any public funds for the erection of a television broadcasting station. It bases its claimed right to such relief on the grounds that defendant, in so doing, would be proceeding under and in furtherance of its written agreement with Television Corporation of Michigan, Inc., and that this would be unlawful in the following 2 respects: (1) that the construction and operation of the television station under that agreement would be a self-liquidating project within the meaning of PA 1958, No. 224, § 11, under which such construction contract is prohibited because approval thereof by the legislature was not first obtained, and (2) the agreement with Television Corporation of Michigan, Inc., constitutes an attempt on the part of defendant to grant the credit of the State to or in aid of that corporation in violation of Michigan Constitution of 1908, art 10, § 12.

The trial court, finding plaintiff's said 2 claims of illegality, as in its bill alleged, not well founded as a matter of law, dismissed the bill. We think he was correct and that the order dismissing, from which plaintiff appeals, should be affirmed. Our reasons follow:

(1) No facts are alleged in the bill from which a conclusion may be drawn or a finding may be made that the project in question is self-liquidating, as in the statute mentioned. That appellation appears in the bill as plaintiff's legal conclusion, without supporting averments. If its conclusion were to be accepted as correct, there are no allegations in the bill that moneys appropriated by Act No. 224 on the supposed condition contained in its section 11 are to be expended on this project, warranting enjoining thereof. If section 11 of that act were to be construed as a general prohibition against the board of trustees of Michigan State University, without regard to the source of the funds to be used or involved, it would exceed legislative authroity. Michigan Constitution of 1908, art 11, § 8.* *State Board of Agriculture* v. *Auditor General,* 180 Mich. 349; *State Board of Agriculture* v. *Auditor General,* 226 Mich. 417; *Weinberg* v. *Regents of University,* 97 Mich. 246.

(2) Defendant's first sworn answer contained language tending to admit plaintiff's second charge of illegality of the agreement.

Thereafter defendant filed an amendment sworn answer, to which it attached as an exhibit a copy of the agreement referred to and relied on in plaintiff's bill of complaint. It shows by its express terms that defendant was not, thereunder, to advance credit to the other contracting party but only to permit it use of the television studio and facilities on a time-sharing and rental basis. Plaintiff made and makes no denial of the correctness of the copy of the agreement attached to defendant's amended sworn answer. By the agreement's express terms plaintiff's second claim of invalidity collapses.

Is defendant bound by its apparent admission in its first answer or may it stand on its amended sworn answer? That the latter is the rule is apparent from *Carroll* v. *Palmer Manfg. Co.*, 181 Mich. 280, 285, *City of Lebanon* v. *DeBard*, 110 Ind. App. 79, 82 (37 NE2d 718); *Staley* v. *Espenlaub*, 128 Kan. 1, 2 (275 P 1095); *Dahl* v. *Winter-Truesdell-Diercks Co.*, 62 ND 351 (243 NW 812); 71 CJS, Pleading, § 321, p 716.

In the above view of the case plaintiff's bill stated no cause of action as a matter of law and was properly dismissed.

* * *

An important public project is here involved. It being obvious that plaintiff has no legal cause of action, we should not permit technicalities to stand in the way of our saying so and disposing of the case accordingly, without need for further fruitless proceedings. This is the more so in view of the well-known fact, not in the record but of which we may take judicial notice, that for over a year the entering into and performance of the contract for the erection of the television station and facilities have been a *fait accompli* with the station and facilities fully constructed and in operation by defendant and its lessee, Television Corporation of Michigan, Inc., leaving the question of enjoining the entering into the contract by defendant and its expending money for the project moot.

Affirmed. No costs.

KELLY, SMITH, EDWARDS, and SOURIS, JJ., concurred with DETHMERS, C. J.

KAVANAGH and BLACK, JJ., dissented.

CARR, J., did not sit.

2. COMMENT

Several important legal principles may be deduced from the cases in Chapters II and III. They may be summarized as follows:

1. The Michigan Constitution vests in the Board of Regents, as well as in the governing boards of other state institutions of higher education, the "general supervision of its institution and the control and direction of all expenditures from the institution's funds." (Art. 8 § 5.) The words "general supervision" must be construed to mean complete authority over all the internal affairs of the University.

2. On the other hand, the University is subject to the general laws of the state concerning the public health, safety, morals and welfare. A university campus cannot be an extraterritorial state within a state.

3. Appropriations made by the legislature become the "property" of the University when the appropriations act becomes effective. Therefore, the legislature cannot subject University appropriations to change or to the control of state administrative officers.

4. The legislature may attach conditions to its appropriations for University support. However, a condition to an appropriation will be struck down as unconstitutional if its effect is to deprive the Board of Regents of any substantial part of its discretion over the educational policy or operation of the University. If such a condition is constitutional, the University must comply with it in order to be entitled to the appropriated money.

Another important legal principle is set forth in the Michigan Constitution (Art. 8 § 4) although it has not been involved in any of the cases in these chapters. To the end that higher education may be maintained and encouraged, the constitution commands the legislature to provide financial support for the University of Michigan and other state institutions. Of course, the amount of this support must be consistent with the other needs and revenues of the state. Therefore, this provision of the constitution probably creates a moral obligation which cannot be enforced by a court of law.

The existence of these rules has guaranteed the independence of the Univeristy, and they are in large measure responsible for its pre-eminent status.

3. OPINIONS OF THE ATTORNEY GENERAL CONCERNING AUTONOMY

The University has been often protected in the preservation of its important constitutional powers by opinions of the state's chief legal officer, the Attorney General.[1] Of course, when the Attorney General makes a ruling adverse to the University, as he did in 1868 by deciding that the University was bound to have a homeopathic professor, he must go to court to enforce his opinion. As a legal corporation with the right to sue and to be sued in its own name, the University can hire its legal counsel, and, as the homeopathic cases make so obvious, the Attorney General does not always prevail.

As respects the ordinary non-corporate state agency, however, the Attorney General has enhanced authority since it is he who by virtue of his office represents the agency in court and provides all legal advice. Thus, advice to such an agency very often takes the place of a court case. Attorneys General, however, seem to have much more freedom to change their minds than the courts do under the doctrine of *stare decisis,* and it seems that old opinions of the Attorneys General are almost never cited by the courts as authority, at least not in the cases with which this volume is concerned, although they probably very often reflect current legal doctrines which are taken too seriously to be challenged in court.

Citations for all opinions here discussed appear at the end of these comments. Many opinions simply reiterate the clear doctrine of the case law to officials who are not familiar with it. For example, in 1922, citing *Weinberg,* the Attorney General ruled that the University was not required to obtain bonds from its construction contractors.[2] On other occasions, however, the Attorney General may venture into controversies completely untouched by judicial opinion. In 1955, for example, the Attorney General ruled as unconstitutional legislation forbidding the University of Michigan and Michigan State University from

operating television stations and from self-liquidating projects without legislative consent.[3] Seven years later, the television issue arose in the *Jackson Broadcasting and Television* case previously discussed.[4]

Cataloguing opinions of the Attorney General under the general heading of the University's freedom from legislative control in the conduct of its general operations, we find many rulings. In 1898, the construction of an addition to the Law Department was not governed by a general statute purporting to control construction at all state institutions.[5] In 1900, the Auditor General had to approve vouchers for the purchase of land by the University without regard to whether the funds came from the University interest fund or from the mill tax.[6] In 1912, the Auditor General was informed that the University might buy its own fire insurance on its own buildings.[7] In 1924, the Board of Regents, with the consent of the State Administrative Board, could obtain low-cost fire insurance within a system set up for state property only.[8] In 1927, a statute requiring the registration and supervision of laboratories within the state, applied to University laboratories only if they were in the business of selling laboratory products at a profit.[9] A tuberculosis unit built with state funds in 1930 as an addition to the University Hospital was outside the authority of the State Tuberculosis Commission.[10] In 1943, the University was not covered by a statute forbidding state institutions from serving oleomargarine.[11] In 1953, the provisions of the School Building Code were intended by the legislature to apply only to classroom buildings.[12] In 1954 the question of whether the University was required to follow the State or City Plumbing Codes was not answered because of voluntary compliance by the University.[13]

In one of the most recent, and most significant opinions, the Attorney General ruled in 1965 that the 1963 Constitution did not permit the legislature to delegate authority over building programs at the ten constitutionally autonomous state colleges and universities to the State Administrative Board and the State Controller.[14] The device of appropriating money to the Controller rather than to the governing boards could not be used to subvert the constitutional status of the educational institutions.

Another category of opinions concerns legislation which affects the governing board's control of its employees. In 1905,

before Michigan State College had achieved constitutional status, the Auditor General was supported in his refusal to pay for out-of-state travel by a professor which could only "indirectly" result in improving performance of employee's duties.[15] However, in 1907 an act purporting to control salaries at all state institutions did not apply to the University of Michigan.[16] Similarly, in 1932, Veterans Preference Laws did not apply to the then two constitutional schools, and neither did the Civil Service Law in 1937.[17] In 1931, statutory delegation of the control over Michigan State's financial affairs could be upset by the governing State Board.[18] And, in 1955 the statutory delegation to the faculty of the control of students, laboratories, museums and libraries was overturned by constitutional provisions which, of course, placed the general supervision of everything in Michigan State in the State Board.[19]

Legislation purporting to affect students has also been disregarded by the Attorney General. In 1901, and again in 1936 and 1959, he ruled that only the constitutionally established governing boards, and not the legislature, could determine the tuition.[20] The statute forbidding tuition for Michigan residents is C.L. para. 390.13 and is reproduced in this volume on page 119. Similarly the children of certain veterans who are residents are purportedly exempted from tuition by C.L. para. 35.111 (see page 123). In 1911, an attempt by the legislature to set the entrance standards for the University of Michigan was rejected,[21] as was a statute enacted in 1949 which exempted members of the Michigan National Guard from military instruction at Michigan State.[22] Complete control over intercollegiate athletics was affirmed in opinions directed at legislators who, provoked by the NCAA television blackout of football in 1951, were considering corrective legislation.[23]

Other rulings illustrate the wide diversity of issues on which the Attorney General has ruled. In 1919, and again in 1958, constitutional status was found to exempt academic publications from control by the State Board of Auditors and the statutory requirement of in-state printing.[24] In 1939, the Attorney General ruled that the legislature had no authority to waive the sovereign immunity of the then Michigan State College and the University of Michigan. Compare this result with the *Branum* case in Chapter VII, page 239. The State Administrative Board therefore, could not be authorized to dispose of minor claims

against the universities.[25] In 1938 a legislator was advised that money could be appropriated to Michigan State on the condition that it be used solely to build and equip 4-H buildings at Chatham, Michigan.[26] On the other hand, a 1962 opinion advised the legislature of the unconstitutionality of conditioning the whole appropriation for Michigan State University on the retention of a labor relations center.[27]

4. STATE STATUTES RELATING TO UNIVERSITY OF MICHIGAN

This section contains the basic statutes which purport to govern the University of Michigan. Although some of these statutes are relatively recent, many of them are very old. Because of the constitutional posture of the University, some of these statutes are of doubtful validity. Several of these statutes have even been declared unconstitutional by the Supreme Court or by the Attorney General, but they remain on the statute books unrepealed–for example, the provisions of statutes requiring the appointment of a homeopathic professor, and prohibiting tuition charges for certain categories of students (§ § 390.5, 390.41, and 390.12, 390.13, 35.111).

Other statutes, although perhaps not technically invalid have become completely obsolete–such as the elaborate provisions for the use of interest on the University fund. This fund was at one time the principal support of the University, but today it is insignificant. Moreover, the 1963 Constitution eliminated all reference to the interest fund contained in Section 11 Article XI of the 1908 Constitution. No payments of interest are now made to the University.

P.A. 1851, No. 151 Eff. July 5 as amended by P.A. 1957, No. 87, § 1 Eff. Sept. 27.

AN ACT to provide for the government of the state university, and to repeal chapter 57 of the Revised Statutes of 1846.

The People of the State of Michigan enact:

390.1 University of Michigan

Sec. 1. That the institution established in this state and known as the university of Michigan, is continued under the name and style heretofore used.

390.2 Same; object

Sec. 2. The university shall provide the inhabitants of this state with the means of acquiring a thorough knowledge of the various branches of literature, science and arts.

390.3 Same; government

Sec. 3. The government of the University is vested in the board of regents.

390.4 Board of regents; body corporate, suits, seal

Sec. 4. The board of regents shall constitute the body corporate, with the right, as such, of suing and being sued, of making and using a common seal, and altering the same.

390.5 Same; powers; professor of homeopathy

Sec. 5. The regents shall have power to enact ordinances, by-laws and regulations for the government of the university; to elect a president, to fix, increase and reduce the regular number of professors and tutors, and to appoint the same, and to determine the amount of their salaries: Provided, That there shall always be at least 1 professor of homeopathy in the department of medicine.

390.6 Same; removal power

Sec. 6. They shall have power to remove the president, and any professor or tutor, when the interest of the university shall require it.

390.7 Same; appointive power

Sec. 7. They shall have power to appoint a secretary, librarian, treasurer, steward, and such other officers as the interests of the institution may require, who shall hold their offices at the pleasure of the board, and receive such compensation as the board may prescribe.

390.8 Departments of university

Sec. 8. The university shall consist of at least 3 departments:

1. A department of literature, science and the arts;
2. A department of law;
3. A department of medicine;
4. Such other departments may be added as the regents shall deem necessary, and the state of the university fund shall allow.

390.9 Special courses

Sec. 9. The regents shall provide for the arrangement and selection of a course or courses of study in the university, for such students as may not desire to pursue the usual collegiate course, in the department of literature, science and the arts, embracing the ancient languages, and to provide for the admission of such students without previous examination, as to their attainments in said languages, and for granting such certificates at the expiration of such course or term of such students, as may be appropriate to their respective attainments.

390.10 Repealed. P.A. 1957, No. 87, § 1, Eff. Sept. 20

390.11 Authority of regents, president and faculty; degrees

Sec. 11. The immediate government of the several departments shall be entrusted to the president and the respective faculties; but the regents shall have power to regulate the course of instruction, and prescribe, under the advice of the professorships, the books and authorities to be used in the several departments; and also to confer such degrees and grant such diplomas as are usually conferred and granted by other similar institutions.

390.12 Fees and tuition; literary department; free courses

Sec. 12. The fee of admission to the regular university course in the department of literature, science and the arts, shall not exceed 10 dollars, but such course or courses of instruction as may be arranged under the provisions of section 9 of this act,[1] shall be open without fee to the citizens of this state.

[1] Section 390.9.

390.13 Same; residents of state

Sec. 13. The university shall be open to all persons resident of this state, without charge of tuition, under the regulations prescribed by the regents, and to all other persons, under such regulations and restrictions as the board may prescribe.

390.14 Same; payment to treasurer; expenditure

Sec. 14. The moneys received from such source shall be paid to the treasurer, and so much thereof as shall be necessary for the purpose, shall be expended by the regents in keeping the university

buildings in good condition and repair, and the balance shall be appropriated for the increase of the library.

390.15 Annual report of regents to superintendent of public instruction

Sec. 15. The board of regents shall make an exhibit of the affairs of the university, in each year, to the superintendent of public instruction, setting forth the condition of the university and its branches, the amount of receipts and expenditures, the number of professors, tutors, and other officers, and the compensation of each; the number of students in the several departments, and in the different classes; the books of instruction used; an estimate of the expenses for the ensuing year, together with such other information and suggestions as they may deem important, or the superintendent of public instruction may require, to embody in his report.

390.16 Interest on university fund; use for erection of buildings

Sec. 16. From the increase arising from the interest of the university fund, the board of regents may erect, from time to time, such buildings as are necessary for the uses of the university, on the grounds set apart for the same; but no such buildings shall be erected until provisions shall be made for the payment of the existing indebtedness of the university, nor until 1 branch of the university shall be established in each judicial circuit of the state.

390.17 Same; use for improvement of grounds and purchase of apparatus

Sec. 17. The board of regents shall have power to expend so much of the interest arising from the university fund, as may be necessary for the improving and ornamenting the university grounds, for the purchase of philosophical, chemical, meteorological, and other apparatus, and to keep the same in good condition.

390.18 Branches of university; support

Sec. 18. As soon as the income of the university interest fund will admit, it shall be the duty of the board of regents to organize and establish branches of the university, 1 at least, in each judicial circuit or district of the state, and to establish all needful rules and regulations for the government of the same. They shall not give to any such branch the right of conferring degrees, nor appropriate a sum exceeding 1,500 dollars, in any 1 year, for the support of any such branch.

390.19 Same; establishment

Sec. 19. The regents may establish and organize a branch or branches, by the creation of a trusteeship for the local management of the same, or they may in their discretion select for a branch, under the restrictions aforesaid, any chartered literary institution in the state.

390.20 Meeting of regents; quorum

Sec. 20. The meetings of the board may be called in such manner as the regents shall prescribe; 5 of them shall constitute a quorum for the transaction of business, and a less number may adjourn from time to time.

390.21 Repealed. P.A. 1957, No. 87, § 1, Eff. Sept. 27.

390.22 Expenses of regents and board of visitors

Sec. 22. The regents and visitors of the university shall each receive pay for the actual and necessary expenses incurred by them in the performance of their duties, which shall be paid out of the university interest fund.

390.23 Orders on treasurer; signatures

Sec. 23. All orders on the treasurer shall be signed by the secretary, and countersigned by the president.

P.A. 1965, No. 245, Imd. Eff. July 21

AN ACT to establish an institute of gerontology; to prescribe its functions; and to make an appropriation for its operation.

The People of the State of Michigan enact:

390.31 Institute of gerontology; authority to establish, purposes

Sec. 1. There may be established by the university of Michigan and Wayne state university jointly, an institute of gerontology for the purpose of developing new and improved programs for helping older people in this state, for the training of persons skilled in working with the problems of the aged, for research related to the needs of our aging population, and for conducting community service programs in the field of aging.

390.32 Same; duties

Sec. 2. The institute shall:

(1) In the field of training,

(a) Stimulate and contribute to training in gerontology in the various schools and departments of the universities.

(b) Offer specialized interdisciplinary training in gerontology at the graduate and postgraduate levels for those entering or already working in the field.

(2) In the fields of research and publications,

(a) Encourage, foster and conduct research in all important areas of gerontology.

(b) Provide research support for university instructional staff and other investigators in gerontology.

(3) In the field of community service, organize and promote programs of community education and services in the field of aging, and shall conduct courses and educational activities designed to serve those working with our older citizens.

390.33 Same; establishment and government by boards

Sec. 3. The institute shall be established by, and governed in accordance with the rules and regulations of the board of governors of Wayne state university and the board of regents of the university of Michigan.

P.A. 1875, No. 128, Eff. Aug. 3

AN ACT for the establishment of a homeopathic medical department of the university of Michigan.

The People of the State of Michigan enact:

390.41 Homeopathic medical department, authority of regents to establish

Sec. 1. The board of regents of the university of Michigan are hereby authorized to establish a homeopathic medical college as a branch or department of said university, which shall be located at the city of Ann Arbor.

P.A. 1895, No. 36, Eff. Aug. 30

AN ACT to enable the regents of the university to take and hold in perpetual trust land or other property.

The People of the State of Michigan enact:

390.51 Board of regents; holding property in trust

Sec. 1. That it shall be competent for the regents of the university to take, by gift, devise or bequest, and hold in perpetuity any land or other property in trust for any purpose not inconsistent with the objects and purposes of the university.

P.A. 1935, No. 245, Eff. Sept. 21 as amended by P.A. 1963, No. 128, § 1 Imd. Eff. May 10 and P.A. 1965, No. 371, § 1, Eff. March 31, 1966.

AN ACT to provide educational opportunities for the children of certain soldiers, sailors, marines and nurses. As amended P.A. 1937, No. 84, Imd. Eff. June 15; P.A. 1943, No. 38, Eff. July 30.

The People of the State of Michigan enact:

35.111 Children of deceased or disabled serviceman; educational aid

Sec. 1. Any person not under 16 and not over 22 years of age who has been a resident of the state of Michigan for 12 months, who is a child of a member of the armed forces of the United States who was killed in action or died from other cause during any war or war condition in which the United States has been, is, or may hereafter be a participant, or who as a result of wartime service has since died or is totally disabled, shall be admitted to and may attend any state tax supported educational or training institution of a secondary or college grade. Such persons admitted to tax supported institutions shall not be required to pay any matriculation fee, athletic fee, tuition or any other fee which takes the place of tuition charges during the time in which he is a student at said state institution.

FOOTNOTES

Section 1 - Cases Interpreting the Constitution of Separation of University & State

1. This term as used in this chapter shall include all educational institutions referred to in the 1963 Constitution authorized to grant baccalaureate degrees.
2. The legislation relating to the University of Michigan has been included at the end of this chapter.
3. *Buehler* and *Draper,* Chapter X.
4. This issue is now before the Circuit Court for the County of Ingham. *The Regents of the University of Michigan et al. v. The State of Michigan et al.,* Civil Case No. 7659-C.
5. The Washtenaw County Circuit Court has ruled that the statute embraces the University. *The Regents of the University of Michigan v. The Labor Mediation Board,* Civil Action 1952. The decision has been appealed.

Section 3 - Opinions of the Attorney General Concerning Autonomy

1. The office of the Attorney General states that it has bound volumes containing opinions of the Attorney General from 1837 to date. Each volume is indexed, and there is a cumulative index in four volumes for all opinions rendered after July 1, 1913.
2. 1920-22 Mich. Op. Att'y. Gen. 289.
3. 1955-56 Mich. Op. Att'y. Gen. 262.
4. Supra p. 111.
5. 1898 Mich. Op. Att'y. Gen. 88.
6. 1901 Mich. Op. Att'y. Gen. 75.
7. 1912 Mich. Op. Att'y. Gen. 212.
8. 1925-26 Mich. Op. Att'y. Gen. 13.
9. 1927-28 Mich. Op. Att'y. Gen. 467.
10. 1930-32 Mich. Op. Att'y. Gen. 25.
11. 1943-44 Mich. Op. Att'y. Gen. 364.
12. 1952-54 Mich. Op. Att'y. Gen. 440.
13. Unpublished opinion, dated December 31, 1954.
14. Opinion dated January 8, 1965.
15. 1905 Mich. Op. Att'y. Gen. 85.
16. 1908 Mich. Op. Att'y. Gen. 95.
17. 1930-32 Mich. Op. Att'y. Gen. 475; 1937-38 Mich. Op. Att'y. Gen. 129.
18. 1930-32 Mich. Op. Att'y. Gen. 243.

19. 1955-56 Mich. Op. Att'y. Gen. 721, vol. I.
20. 1901 Mich. Op. Att'y. Gen. 87. 1937-38 Mich. Op. Att'y. Gen. 29; unpublished opinion, No. M-541, dated June 3, 1959.
21. 1911 Mich. Op. Att'y. Gen. 215.
22. 1949-50 Mich. Op. Att'y. Gen. 405.
23. 1951-52 Mich. Op. Att'y. Gen. 115; 1951-52 Mich. Op. Att'y. Gen. 255; 1951-52 Mich. Op. Att'y. Gen. 433.
24. 1920 Mich. Op. Att'y. Gen. 106; 1957-58 Mich. Op. Att'y. Gen. 26, vol. II.
25. Unpublished opinion No. 11937, dated August 23, 1939.
26. 1937-38 Mich. Op. Att'y. Gen. 422.
27. 1961-62 Mich. Op. Att'y. Gen. 594.

Part Two

The University as a Part of State Government

CHAPTER IV

THE BOARD OF REGENTS

1. INTRODUCTION

Each governing board of the three major state universities in Michigan is composed of eight elected members. The president of each institution is *ex officio,* a member of the board without the right to vote. The members are popularly elected for overlapping terms of eight years. The statutes which prescribe nomination of candidates by political party, and also such matters as qualifications for office, and the procedure for removal from office, impeachment, resignation and recall, are reproduced at the end of this chapter.

Although the Attorney General has been called upon from time to time to pass on questions under the statutes, the only case which was litigated in the Supreme Court on these issues was *Attorney General ex rel. Cook v. Burhans* in which the court decided that the man who had received the most votes was disqualified from serving as a Regent because at the time of the election, he was a state senator. Legislators are not qualified to hold any other state office during their term as legislators. The majority of the court decided that the disqualification of an acting Regent created a vacancy to be filled by gubernatorial appointment. A vigorous dissent argued that if Burhans was not qualified, Cook who received the next largest number of votes had been legally elected a Regent; hence, there should be no vacancy to be filled.

2. JUDICIAL DECISION

Attorney General ex rel. Cook v. Burhans

304 Mich. 108, 109-20; 7 N.W. 2d 370 (1942)

WIEST, J. The attorney general, ex rel. Franklin M. Cook, by information in the nature of quo warranto, seeks ouster of defendant from the office of regent of the University of Michigan on the ground that he has no legal right to the office and is a mere usurper therein and also asks the court to adjudicate that Franklin M. Cook is the regent. Defendant by answer asserts right to hold the office by valid election thereto. At the biennial State election in April, 1941, two regents of the University of Michigan were to be elected and defendant was a candidate. At that time he was a member of the State senate and is still such officer. The board of State canvassers found that defendant received 410,767 votes, Alfred B. Connable, 409,672, Franklin M. Cook, relator herein, 408,438, and some lesser votes for other candidates, and certified the election of defendant and Connable to the secretary of State. Defendant filed his oath of office as regent and has since acted as such.

Defendant is not a regent of the University of Michigan, for every vote cast for him at such election was void under article 5, § 7, of the Michigan Constitution, which reads:

"No person elected a member of the legislature shall receive any civil appointment within this State or to the senate of the United States from the governor, except notaries public, or from the governor and senate, from the legislature, or any other State authority, during the term for which he is elected. All such appointments and all votes given for any person so elected for any such office or appointment shall be void."

This provision applies to elections and its mandate must be obeyed. *Fyfe* v. *Kent County Clerk,* 149 Mich. 349.

Defendant having usurped the office of regent, in defiance of the mandate of the Constitution barring him under any circumstances from holding such office and rendering all votes cast for him void, it was proper for the attorney general to bring this proceeding in the nature of quo warranto to oust him from such office. The provision in the Constitution not only rendered defendant ineligible to the office but to prevent his intrusion therein rendered every vote cast for him void. Defendant received no votes capable of being recognized by law.

Defendant contends that regents of the university are not State officers but only officers of the corporate body known as the board of regents of the university.

The university is a State institution, with obligation on the legislature to maintain it. The regents are State officers and, as the board of regents, constitute the body corporate known as the "Regents of the University of Michigan"* and have the general supervision of the University and the direction and control of all expenditures from the university funds. Const. 1908, art. 11, § 5. In *People, for use of Regents of the University of Michigan,* v. *Brooks,* 224 Mich. 45, we held the board of regents is a department of the State government created by the Constitution to perform State functions.

Defendant is a usurper in the office of regent and a writ of ouster will issue if necessary to remove him therefrom. This ouster creates a vacancy in the office of regent.

The statute, 1 Comp. Laws 1929, § 3350 (Stat. Ann. § 6.693), provides that:

"Every office shall become vacant, on the happening of either of the following events, before the expiration of the term of such office: * * *

"6. The decision of a competent tribunal, declaring void his election or appointment."

The Constitution of 1908, art. 16, § 5, provides:

"The legislature may provide by law the cases in which any office shall be deemed vacant and the manner of filling vacancies, where no provision is made in this Constitution."

The Constitution also provides in art. 11, § 3:

"When a vacancy shall occur in the office of regent it shall be filled by appointment of the governor."

The ouster of Mr. Burhans creates a vacancy to be filled by the governor. No costs.

BOYLES, NORTH, BUTZEL, BUSHNELL, and SHARPE, JJ., concurred with WIEST, J.

NORTH, J. *(concurring.)* I concur in the result reached by Mr. Justice WIEST; but to avoid a possible misconstruction of our holding, I think the following should be specifically noted. Defendant while holding the office of State senator sought the nomination and

*See Const. 1908, art. 11, § 4.–REPORTER.

election as a regent of the University of Michigan for a term which began a year before the expiration of defendant's office as senator. Both offices are State offices and are incompatible. Under the constitutional provisions (art. 5, § 7, art. 11, § 3) and the statute (1 Comp. Laws 1929, § 3350 [Stat. Ann. § 6.693]) cited in my Brother's opinion defendant was ineligible to election as regent for a term which began prior to the expiration of defendant's term as senator and our decision herein creates a vacancy in the office of regent. See *Fyfe* v. *Kent County Clerk,* 149 Mich. 349, and *Murtha* v. *Lindsay,* 187 Mich. 79.

Under the cited constitutional provision (article 5, § 7) it cannot be said that since the two offices are incompatible, when defendant assumed the office of regent he vacated the office of senator. To so hold would be to circumvent the express provisions of the Constitution, and in effect to nullify its clear mandate.

I am not in accord with the opinion written by Mr. Chief Justice CHANDLER wherein he holds that by our judgment in this case Mr. Cook should be installed in the office of regent of the university. To so hold would be in plain violation of the specific provision of article 11, § 3, of the Constitution and also of article 6, § 10, of the Constitution. Section 3, art. 11, contains the following explicit provision: "When a vacancy shall occur in the office of regent it shall be filled by appointment of the governor;" and section 10, art. 6, reads: "Whenever a vacancy shall occur in any of the State offices, the governor shall fill the same by appointment, by and with the advice and consent of the senate, if in session." The office of regent of the University of Michigan is a State office; and our decision herein creates a vacancy in that office. Regardless of any statutory provision which may be considered as in conflict with the two above-quoted constitutional provisions, I am unable to understand how it can be held that the statute controls instead of the constitutional provisions.

Notwithstanding the foregoing would seem to be conclusive of the question under consideration, it may be pertinent to point out that the decisions upon which Mr. Chief Justice CHANDLER relies have no application to the instant case. First, it should be noted that the statutory provisions quoted in my Brother's opinion (3 Comp. Laws 1929, §§ 15274-15276 [Stat. Ann. §§ 27.2318-27.2320]) have been a part of the statutory law of this State since the enactment of the statutes of 1846. See Rev. Stat. 1846, chap. 136, §§ 3, 4, and 5. These provisions are still effective (in the absence of some other conflicting statutory or constitutional provision) provided the vacancy to be filled is not a *State* office. But they are not operative as to vacancies in State offices because subsequent to the enactment of the statute each of the above-quoted constitutional provisions was

embodied in the Constitution of 1850* and carried over into the Constitution of 1908. No provision will be found in the Constitution of 1835 which is comparable to either of the constitutional provisions hereinbefore quoted.

As noted above none of the cases cited in the opinion of Mr. Chief Justice CHANDLER tends to sustain his position because none of them involves the filling of a vacancy in a *State* office. The following are the cases upon which my Brother relies: *People, ex rel. Falkenburg,* v. *Miles,* 2 Mich. 348, in which the office involved was that of county clerk; *People, ex rel. Wagenseil,* v. *Stephenson,* 98 Mich. 218, involved, as appears from the original records in this court, the office of city clerk of Port Huron; and *Emmons* v. *Board of Supervisors,* not reported but cited in the *Stephenson Case,* involved the office of township supervisor, as also appears from the original records in this court. It would seem to go without saying that the decision in each of these cases in no way conflicts with the constitutional provision that: "Whenever a vacancy shall occur in any of the *State* offices the governor shall fill the same." And it is equally plain, in view of the quoted provisions of the Constitution, that this court in this proceeding is without power to fill the vacancy in the office of regent created by our decision herein.

Chief Justice CHANDLER says: "We should not apply a portion of one statute, which has remained on the books for almost 100 years, and then utterly disregard its remaining provisions and apply those of another statute, even though of equal age and respect." I am in full accord with this statement, except where, as in my Brother's opinion, an attempt is made to apply a statutory provision in a manner which is plainly violative of constitutional provisions.

The conclusion reached by Mr. Justice WIEST should be the decision of this court herein; and if necessary a writ of ouster should issue. No costs allowed.

BOYLES and BUTZEL, JJ., concurred with NORTH, J.

CHANDLER, C. J. *(dissenting.)* We all agree that the votes cast for the defendant Burhans for the office of regent of the University of Michigan while he was a member of the State Senate are void, but we do not agree on the result of such holding.

Mr. Justice WIEST holds that the ouster of the defendant creates a vacancy in the office of regent because of 1 Comp. Laws 1929, § 3350 (Stat. Ann. § 6.693), and that the vacancy under the provision of article 11, § 3, of the Constitution, shall be filled by

*Article 13, § 6, art. 8, § 3—Reporter.

appointment of the governor. This same provision is found in article 13, § 6, of the Constitution of 1850, and the statute upon which Mr. Justice WIEST relies has remained unchanged since it was amended by Act. No. 172, Pub. Acts 1851. Relator Cook's information is based upon the quo warranto statutes, 3 Comp. Laws 1929, § 15271 *et seq.* (Stat. Ann. § 27.2315 *et seq.*). Many decisions of this court have been based upon the use of this procedure, among these being *People, ex rel. Falkenburg,* v. *Miles,* 2 Mich. 348, decided in 1852, and *People, ex rel. Wagenseil,* v. *Stephenson,* 98 Mich. 218, decided in 1893. In the *Falkenburg Case* Mr. Justice DOUGLASS said:

"In a State like ours, where public officers are nearly all elective, and where public opinion must usually be an effective check upon all usurpations of office without some pretences of right, founded upon the suffrages of the people, it is obvious that the question most frequently to be tried on informations like the present, will be whether the defendant received a majority of the votes cast at an election. If he did not, some one else must have received it. In such cases, and in others of like character, it is apparent that the right of some other person is necessarily involved in the issue between the people and the defendant, and being so involved, the statute permits the Court, when justice so requires, to adjudicate upon it. The averment in question seems designed merely to furnish some foundation in the record for this judgment.

"It is not traversable by the defendant, for it is no concern of his who is entitled to the office if he is not. Of course it is not admitted by his omission to traverse it. There is no need that it should be special, because no issue can be formed upon it. The defendant is required to set forth the facts which constitute his own title specifically by plea. An issue of law or fact must generally be formed by the replication to this plea. This is the issue to be determined. If it is determined against the defendant, and if it is a necessary inference from this judgment and the facts upon which it is based, that the person alleged to be entitled to the office the defendant has usurped, in law and in fact is so, the Courts are authorized, from considerations of public policy quite apparent, to affirm his right by a direct adjudication."

In the *Wagenseil Case* Mr. Justice MONTGOMERY said:

"Upon a judgment of amotion from office, the party amoved is divested of all official authority; and excluded from office, so long as the judgment remains in force. High, Extraordinary Remedies, § 756. And, when judgment is rendered in favor of a relator, he

needs no writ to invest him with the office. Under How. Stat. § 8639, he is entitled to take upon himself the execution of the office. Can this right be defeated or suspended by suing out a writ of error and giving a bond to stay execution? The statute (sections 8679, 8681) provides for a stay of execution by suing out a writ of error, but does not authorize a suspension of a judgment which requires no aid from process to give it effect. The practical result of permitting such a writ to suspend the judgment in quo warranto cases would in many cases be to defeat the relator of his remedy wholly. Such a construction is not to be indulged, except it be imperatively required by the terms, which we think is not the case here. This precise question was determined by the Court in the October term of 1886, in the unreported case of *Emmons* v. *Board of Supervisors.* See, also, *Welch* v. *Cook,* 7 How. Pr. (N.Y.) 282."

I am unable to see how we can consider an information filed under the quo warranto statutes and then deprive the relator of the benefit of those statutes.

Sections 15274-15276, 3 Comp. Laws 1929 (Stat. Ann. §§ 27.2318-27.2320), read as follows:

"SEC. 4. Whenever any such information shall be filed against any person for usurping any office, the attorney general, in addition to the other matters required to be set forth in the information, may also set forth therein the name of the person rightfully entitled to such office, with an averment of his right thereto.

"SEC. 5. In every such case judgment shall be rendered upon the right of the defendant, and also upon the right of the party so entitled; or only upon the right of the defendant, as justice shall require.

"SEC. 6. If judgment be rendered upon the right of the person so averred to be entitled, and the same be in favor of such person, he shall be entitled, after taking the oath of office, and executing any official bond which may be required by law, to take upon him the execution of the office; and it shall be his duty, immediately thereafter, to demand of the defendant in such information, all the books and papers in his custody or within his power, belonging to such office."

We are required under these statutes, in the light of the averment of the information, to render judgment upon the right of defendant, and also upon the right of the relator, or only upon the right of the defendant "as justice shall require." It does not seem to be justice to deny the relator the right to a judgment if the votes cast

for Senator Burhans are void. In the light of section 6 and the facts as stated by Mr. Justice WIEST, the relator is entitled, "after taking the oath of office, and executing any official bond which may be required by law," to take upon himself the execution of the office of regent.

Mr. Connable received the highest number of countable votes and was duly elected. Relator Cook received the next highest number of countable votes and was also elected. The vacancy statute was obviously intended to cover a situation where no one other than the usurper has a claim to the office; and, unless the quo warranto statutes can be fully applied, I know of no other procedure whereby one lawfully elected to an office can gain possession of that office. We should not apply a portion of one statute, which has remained on the books for almost 100 years, and then utterly disregard its remaining provisions and apply those of another statute, even though of equal age and respect. Both of these statutes were on the books when the Constitution of 1850 was adopted and when Mr. Justice DOUGLASS wrote the *Falkenbury Opinion* in 1852.

This is not a case of mere ineligibility to an office but one where the Constitution provides that all votes cast for one who is a member of the legislature were void. In point of law, defendant received no votes for the office which may be considered for any purpose. The ouster of defendant does not create a vacancy but only removes a usurper who has kept relator out of office.

In a democracy there is no higher authority by which a civil officer can receive an election or appointment than by the exercise of the elective franchise by qualified electors. This court said in *Fyfe* v. *Kent County Clerk,* 149 Mich. 349, cited in the opinion of Mr. Justice WIEST, that the terms "election" and "appointment" are synonymous. See, also, *McPherson* v. *Blacker,* 146 U.S. 1 (13 Sup. Ct. 3, 36 L. Ed. 869).

Connable and relator had the highest number of valid votes that could be counted for the office of regents of the University of Michigan and were duly elected. To hold otherwise, by declaring that a vacancy exists by reason of certain statutory provisions, is a clear attempt to circumvent the express provisions of the Constitution and, in effect, nullify its clear mandate.

No department of the State government, executive, legislative or judicial, has authority to disregard the letter or spirit of the Constitution.

Article 16, § 5, of the present Constitution, quoted by Mr. Justice WIEST, is not applicable to the instant case because article 5, § 7, is controlling.

It should therefore be determined that relator is entitled to the

office of regent of the University of Michigan by virtue of the 1941 general election, upon compliance with the provisions of 3 Comp. Laws 1929, § 15276 (Stat. Ann. § 27.2320).

A judgment should issue ousting defendant from the office of regent and entitling relator to that office upon his compliance with the statute. It should be so ordered.

STARR, J., concurred with CHANDLER, C. J.

3. OPINIONS OF ATTORNEY GENERAL

Questions involving interpretation of election laws are often directed to the Attorney General. As early as 1894, an Attorney General ruled that the Regent appointed by the Governor should serve the balance of the unexpired term.[1] A statute which would have limited the appointment to the period until the next election was void because of a conflict with the constitution. The present statute conforms to the Attorney General's opinion,[2] but the present wording of the constitution would seem to permit the legislature to limit the term of an appointee: It reads, "Each appointee shall hold office until a successor has been nominated and elected as provided by law."[3]

In 1907, a Federal District Judge sitting in Grand Rapids, was assured that he was qualified to serve as Judge and Regent at the same time, although he should disqualify himself from judging any case in his court to which the University was a party.[4]

The Superintendent of Public Instruction, as *ex officio* Regent, [changed under the 1963 Constitution] was assured of his rights to use the title of Regent, to speak and to enter discussions at meetings of the board. He could not, however, vote, and thus his presence could not be counted in determining whether a quorum was present.[5]

In 1943, the Attorney General was called upon to determine the time at which a Governor's appointment took effect. He ruled that the appointment was complete when a document was signed by the Governor, even though the document had never been delivered to the Secretary of State.[6]

Miscellaneous rulings by the Attorney General's office have determined the funds from which the expenses of the Regents

should be paid,[7] approved the practice of holding closed meetings of the governing boards[8] (but, see Article 8, § 4 of the 1963 Constitution), and have forbidden the delegation of the preparation of vouchers, in 1925, for the State Auditor.[9]

Recently the Attorney General's rulings involving conflicts of interest have had drastic effect. The Attorney General's office issued opinions in this area as early as 1907 when it held a contract between the then Michigan State College and adjoining property owners to be void largely because the college secretary who signed the contract on behalf of the college had property interests in some of the affected lands.[10] In 1958, a Regent of the University of Michigan who was associated with University Microfilms Company, a concern which regularly took books from the University Library to make copies for other college libraries, requested an opinion from the Attorney General as to the conflict of interests law. At that time, the Regent was assured of the propriety of his situation because such borrowing of library books involved no "contract" in the statutory sense of the word.[11]

After the adoption of the present state constitution, the Attorney General again made a landmark ruling on this question of conflict of interest. He issued a comprehensive opinion, the effect of which was to cause a large number of resignations by persons holding positions in businesses from their positions as officers or board members of universities, and *vice versa.* Extracts from this opinion appear at the end of this chapter.

The Attorney General in 1968 issued rulings concerning three officers of Michigan State University and their activities which might have been held violative of the conflict of interest statute. President Hannah sold land adjoining the campus to a private party after acquiring it over the period of his tenure as a University official,[12] Vice President May had an interest in corporations which did business with the University,[13] and Trustee Harlan had been employed by a corporation which did business with the University.[14]

4. STATE ELECTION LAWS

P.A. 1954, No. 116, Eff. June 1, 1955 (as amended by P.A. 1963, 2nd Ex. Sess., No. 5, § 1)

AN ACT to reorganize, consolidate and add to the election laws; to provide for election officials and prescribe their powers and duties; to provide for the nomination and election of candidates for public office; to provide for the resignation, removal and recall of certain public officers; to provide for the filling of vacancies in public office; to provide for and regulate primaries and elections; to provide for the purity of elections; to guard against the abuse of the elective franchise; to define violations of this act; to prescribe the penalties therefore; and to repeal certain acts and all other acts inconsistent herewith.

The People of the State of Michigan enact:

* * *

168.281 State board of education, board of regents, board of trustees, board of governors; eligibility

Sec. 281. No person shall be eligible to membership on the state board of education, the board of regents of the University of Michigan, the board of trustees of Michigan State University, or the board of governors of Wayne State University who is not a registered and qualified elector of this state.

168.282 Board of regents, board of trustees, board of governors; nomination, time

Sec. 282. At its fall state convention each political party may nominate 2 candidates for membership on the board of regents of the University of Michigan, 2 candidates for membership on the board of trustees of Michigan State University and 2 candidates for membership on the board of governors of Wayne State University. Nomination to membership on the board of regents of the University of Michigan shall occur in 1966 and every second year thereafter. Nomination to the board of trustees of Michigan State University and to the board of governors of Wayne State University shall occur in 1964 and every second year thereafter.

168.282a State board of education; nomination, time

Sec. 282a. At its fall state convention of 1964, each political party may nominate 8 candidates for membership on the state board of education. Two candidates shall be nominated for 2-year terms, 2 for 4-year terms, 2 for 6-year terms and 2 for 8-year terms. At its fall state convention of 1966, and every 2 years thereafter, each political party may nominate 2 candidates for membership on the state board of education.

168.283 State board of education, board of regents, board of trustees, board of governors; certification of nominees; vignette

Sec. 283. Not more than 24 hours after the conclusion of the fall state convention, the state central committee of each political party shall convene and canvass the proceedings of said convention and determine the nominees of said convention for membership on the state board of education, the board of regents of the University of Michigan, the board of trustees of Michigan State University, and the board of governors of Wayne State University. The chairman and secretary of said committee shall, within 24 hours after the conclusion of the state convention, forward by registered or certified mail to the secretary of state and to the board of election commissioners of each county, in care of the county clerk at the county seat, a copy of the vignette adopted by said state central committee and the typewritten or printed names, together with residence, including the street address if known, of the candidates nominated at said convention for said offices.

168.284 Same; withdrawal of nominee

Sec. 284. Any person who has been certified by the state central committee of any party as nominated for membership on the state board of education, the board of regents of the University of Michigan, the board of trustees of Michigan State University, or the board of governors of Wayne State University may withdraw by filing a written notice of withdrawal with the secretary of state or his duly authorized agent and a copy with the chairman and the secretary of the state central committee of said party not later than 4 p.m. eastern standard time, of the thirty-third day preceding the election.

168.285 Same; vacancy of nomination

Sec. 285. Whenever a candidate of a political party, after having been nominated to membership on the state board of education,

the board of regents of the University of Michigan, the board of trustees of Michigan State University, or the board of governors of Wayne State University, shall die, withdraw, remove from the state, or become disqualified for any reason, the state central committee of said party shall meet forthwith and, by a majority vote of the members thereof, shall select a candidate to fill the vacancy thereby caused. The name of the candidate so selected shall be immediately certified by the chairman and the secretary of said committee to the secretary of state and to the board of election commissioners for each county, whose duty it is to prepare the official ballots, and said board shall cause to be printed or placed upon said ballots, in the proper place, the name of the candidate so selected to fill the vacancy.

168.286 Board of regents, board of trustees, board of governors; election, time

Sec. 286. Two members of the board of regents of the University of Michigan shall be elected at the general election in 1966 and in every general election thereafter. Two members of the board of trustees of Michigan State University and 2 members of the board of governors of Wayne State University shall be elected at the general election in 1964 and in every general election thereafter.

Constitution

Art. 2, § 5, provides:

"Except for special elections to fill vacancies, or as otherwise provided in this constitution, all elections for national, state, county and township offices shall be held on the first Tuesday after the first Monday in November in each even-numbered year or on such other date as members of the congress of the United States are regularly elected."

168.286a State board of education, election, time, terms

Sec. 286a. Eight members of the state board of education shall be elected at the general election in 1964. Two members shall be elected for 2-year terms, 2 for 4-year terms, 2 for 6-year terms, and 2 for 8-year terms. Two members of the state board of education shall be elected for 8-year terms at the general election in 1966 and in every general election thereafter.

168.287 State board of education, board of regents, board of trustees, board of governors; certificate of determination by board of state canvassers.

Sec. 287. The board of state canvassers shall determine which candidates for membership on the state board of education, the board of regents of the University of Michigan, the board of trustees of Michigan State University and the board of governors of Wayne State University have received the greatest number of votes and shall declare such candidates to be duly elected. The said board shall forthwith make and subscribe on its statement of returns a certificate of such determination and deliver the same to the secretary of state.

168.288 Same; certificate of election

Sec. 288. The secretary of state shall file in his office and preserve the original statement and determination of the board of state canvassers of the result of the election and shall forthwith execute and cause to be delivered to the persons thereby declared to be elected to membership on the state board of education, the board of regents of the University of Michigan, the board of trustees of Michigan State University and the board of governors of Wayne State University a certificate of election, certified by him under the great seal of the state.

168.289 Same; terms of office

Sec. 289. Subject to section 286a,[1] the term of office of members of the state board of education, the board of regents of the University of Michigan, the board of trustees of Michigan State University, and the board of governors of Wayne State University shall be 8 years and shall begin at 12 noon on January 1 next following their election. The terms of office of members of said boards shall continue until a successor is elected and qualified.

[1] Section 168.286a.

168.290 Same; oath, deposit

Sec. 290. Every person elected to membership on the state board of education, the board of regents of the University of Michigan, the board of trustees of Michigan State University, or the board of governors of Wayne State University, before entering upon the duties of his office, shall take and subscribe to the oath as provided in section 1 of article 11 of the state constitution, and shall deposit said oath with the secretary of state.

Constitution

Art. 11, § 1, provides:

"All officers, legislative, executive and judicial, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of . . . according to the best of my ability. No other oath, affirmation, or any religious test shall be required as a qualification for any office or public trust."

168.291 Same; resignation, notice

Sec. 291. Any person duly elected to membership on the state board of education, the board of regents of the University of Michigan, the board of trustees of Michigan State University or the board of governors of Wayne State University, who desires to resign shall file a written notice containing the effective date of such resignation with the governor and a copy with the secretary of state.

168.292 Same; vacancy, creation, notice

Sec. 292. There shall be a vacancy on the state board of education, the board of regents of the University of Michigan, the board of trustees of Michigan State University, or the board of governors of Wayne State University upon the happening of any of the following events: Death of the incumbent; his resignation; his removal from office for cause; his ceasing to be a resident of the state; his conviction of an infamous crime, or an offense involving the violation of his oath of office; the decision of a competent tribunal declaring his election or appointment void; or his neglect or refusal to take and subscribe to the constitutional oath of office and deposit the same in the manner and within the time prescribed by law. When a vacancy shall occur on any of the said boards, a notice of such vacancy and the reason why the same exists, shall, within 10 days after such vacancy occurs, be given in writing to the governor. Such notice shall be given by the secretary of state.

168.293 Same; impeachment, removal from office; notice of charges

Sec. 293. Any member of said boards may be removed from office upon conviction in impeachment proceedings for the reasons and in the manner set forth in section 7 of article 11 of the state constitution. The governor shall have the power and it shall be his

duty, except at such time as the legislature may be in session, to examine into the condition and administration of said boards and the acts of the members enumerated herein and to remove from office for gross neglect of duty or for corrupt conduct in office, or any other misfeasance or malfeasance therein, and report the causes of such removal to the legislature at its next session. Such person shall be served with a written notice of the charges against him and be afforded an opportunity for a public hearing conducted personally by the governor.

Constitution

Art. 5, § 10, provides:

The governor shall have the power and it shall be his duty to inquire into the condition and administration of any public office and the acts of any public officer, elective or appointive. He may remove or suspend from office for gross neglect of duty or for corrupt conduct in office, or for any other misfeasance or malfeasance therein, any elective or appointive state officer, except legislative or judicial, and shall report the reasons for such removal or suspension to the legislature.

Art. 11, § 7, provides:

"The house of representatives shall have the sole power of impeaching civil officers for corrupt conduct in office or for crimes or misdemeanors, but a majority of the members elected thereto and serving therein shall be necessary to direct an impeachment."

168.294 Same; appointment to fill vacancy

Sec. 294. Whenever a vacancy shall occur on the state board of education, the board of regents of the University of Michigan, the board of trustees of Michigan State University, or the board of governors of Wayne State University, the governor shall appoint a successor to fill such vacancy, and the person so appointed shall take the oath of office and shall hold office for the remainder of the unexpired term and until his successor is elected and qualified. A candidate receiving the highest number of votes for membership on any of said boards and who has subscribed to the constitutional oath shall be deemed to be elected and qualified even though a vacancy occurs prior to the time he shall have entered upon the duties of his office.

168.295 Same; recount

Sec. 295. The votes cast for any candidate for membership on the state board of education, the board of regents of the University of Michigan, the board of trustees of Michigan State University and the board of governors of Wayne State University at any election shall be subject to recount as provided in chapter 33 of this act.

168.296 Same; recall

Sec. 296. Any person elected to membership on the state board of education, the board of regents of the University of Michigan, the board of trustees of Michigan State University, or the board of governors of Wayne State University shall be subject to recall as provided in chapter 36 of this act.

Constitution

Art. 2, § 8, provides:

"Laws shall be enacted to provide for the recall of all elective officers except judges of courts of record upon petition of electors equal in number to 25 percent of the number of persons voting in the last preceding election for the office of governor in the electoral district of the officer sought to be recalled. The sufficiency of any statement of reasons or grounds procedurally required shall be a political rather than a judicial question."

5. EXCERPTS FROM OPINION OF ATTORNEY GENERAL (NO. 4587) dated Sept. 1967, relating to conflict of interest

Representative Faxon submitted to me several questions, phrased in general terms, relative to possible conflicts of interest by members of governing boards and officers of state institutions of higher education. These questions may be condensed to read as follows:

1. Would a member of a governing board or an officer of an institution of higher education that enjoys constitutional status under Article VIII of the Michigan Constitution of 1963 be in violation of Article IV, Section 10 of the Constitution and/or Act 317, PA 1966 if such person were to serve simultaneously as an officer or director of a bank, or any other enterprise for profit, that does business with the educational institution that he is serving?

2. If any violation does exist, what legal consequences could ensue?

The Purpose and Meaning of Conflict of Interest

Article IV. Section 10 of the Michigan Constitution of 1963 provides:

"No member of the Legislature nor any state officer shall be interested directly or indirectly in any contract with the state or any political subdivision thereof which shall cause a substantial conflict of interest. The Legislature shall further implement this provision by appropriate legislation."

As a statement of the basis and public policy upon which this statement prohibiting conflicts of interest now embedded in our Constitution rests, it would be difficult to improve upon the language of Justices Manning and Christiancy in The People, ex rel Albert Plugger, et al v. The Township Board of Overyssel, 11 Mich. 222 (1863). Speaking for the court, Justice Manning said:

". . . All public officers are agents, and their official powers are fiduciary. They are trusted with public functions for the good of the public; to protect, advance and promote its interests, and not their own. And, a greater necessity exists in private life for removing from them every inducement to abuse the trust reposed in them, as the temptations to which they are sometimes exposed and stronger, and the risk of detection and exposure is less. . . ." (p. 225)

To which Justice Christiancy added in his concurring opinion:

"The public were entitled to their best judgment, unbiased by their private interests, and by accepting the office they became bound to exercise such judgment, and to use their best exertions for the public good, regardless of their own. They had no right, while they continued in office, to place themselves in a position where their own interests would be hostile to those of the public. . . . And, though these contractors may, as members of the board, have acted honestly, and solely with reference to the public interest, yet if they acted otherwise, they occupy a position which puts it in their power to conceal the evidence of the facts, and to defy detection." (pp. 226, 227)

Private Corporation

Since the constitutional provision establishes the pattern, the answer to the first question as rephrased requires only a determination of whether the facts described, or rather the circumstances deducible from the facts described, fall comfortably within this pattern. If it be determined that members of governing boards and officers of institutions of higher education enjoying constitutional status are "state officers" within the ambit of Article IV, Section 10 of the Constitution, supra, then there can be no doubt that their simultaneous service as officer or director of a bank, or any other enterprise for profit, which enters into contractual relationship with their educational institution is prohibited by the aforesaid section of the Constitution.

Service as an officer or director of a private corporation is per se a substantial interest in that entity. See Opinion No. 4555 of April 12, 1967.

Directors of a corporation must safeguard, care for and promote the corporation's interest, Wiseman v. United Dairies, Inc., 324 Mich. 473 (1949), and they must exercise the same degree of fidelity and care which an ordinarily careful man would use in his own affairs of like magnitude and importance, Trembert v. Mott, 271 Mich. 683 (1935). The conclusion that the interest a director has in the corporation he is serving must be "substantial" is therefore inescapable; any other conclusion would derogate from the degree of dedication and fidelity that he must devote towards the corporation.

Insofar as officers of private corporations are concerned, it is equally clear that, although such officers generally derive their authority to represent the corporation from the board of directors, the corporate functions must be performed by corporate officers or agents. And, as in the case of directors, corporate officers have a duty to serve their corporation with fidelity.

While it is conceivable that, in some rare instance, a corporate officer may hold a title devoid of any apparent substantial interest to himself, the title itself must be deemed to have been conferred for the mutual benefit of the corporation and the officer in question. Were only a trivial benefit running to the officer to exist, it would be advisable for any state officer holding such an empty title to divest himself of it if a prohibited contractual relationship is present—such a gesture could hardly be viewed as too great a sacrifice for the opportunity to engage in public service. This would be necessary since any title as officer of a corporation must be presumed to carry with it commensurate obligation to serve the interest of that corporation.

With the exception of the colleges and universities that are newly formed, the decision of a college or university to avail itself of a particular public utility service is a matter of history and based upon such decision the college or university and the public utility company have undertaken financial obligations to insure proper service. Thus it must be held that any conflict of interest that may result from a person serving as a university governing board member or officer and also as an officer or director of a public utility furnishing service to a college or university is unsubstantial as it relates to a public utility service rendered to the university.

Employe of Labor Organization

Representative Hampton advises me that Don Stevens, a member of the Michigan State University Board of Trustees, is employed by the Michigan AFL-CIO. Several months ago he voted favorably upon a resolution requiring Michigan State University to purchase printing services only from unionized printing shops. Subsequently, this resolution of the Board of Trustees was modified so as to permit non-union shops to provide such services if they certified that they are observing union standards.

Representative Hampton asked my opinion on the following question:

"Whether Don Stevens, a member of the Michigan State University Board of Trustees, is engaged in a similar, or any, conflict of interest with MSU."

Article IV, Section 10 of the Michigan Constitution provides in pertinent part:

"No member of the Legislature nor any state officer shall be interested directly or indirectly in any contract with the state or any political subdivision thereof which shall cause a substantial conflict of interest."

Mr. Don Stevens occupies neither an executive office nor is a member of the Executive Board of the Michigan AFL-CIO. Instead he is employed as education director of that organization by virtue of appointment of the president and approval of the Executive Board.

. . . A substantial conflict exists where a state officer accepts other employment or engages in a business of professional activity

which would require him to disclose confidential information acquired by him in the course of his official duties. There appears to be no foundation for any conclusion that Mr. Stevens, by virtue of his position as educational director of the Michigan AFL-CIO, is required to disclose confidential information acquired by him in the course of his duties as a member of the Board of Trustees of Michigan State University.

Are Officers and Board Members 'State Officers'?

Having established that directors and officers of private corporations must be deemed to have a substantial interest in the business affairs of such corporations, the proper answer to the first question stated above requires only determination of whether persons serving as members of governing boards of state institutions of higher education or as officers thereof are "state officers" within the meaning of Article IV, Section 10.

Governing boards of state institutions of higher education having authority to grant baccalaureate degrees owe their existence to provisions of the Constitution. . . . It has been pointed out that state universities are corporations created for public purposes. Regents of the University of Michigan v. Board of Education of Detroit, 4 Mich. 213 (1856) and, under Article VIII, Section 4 of the Constitution of 1963, the Legislature is required to appropriate money to maintain these institutions and must be given an annual accounting of all income and expenditures by each of them. Thus, despite their independent constitutional status, state institutions of higher education retain a part of the state government. Branum vs. Board of Regents of University of Michigan, Mich. App. 134 (1966).

Members of the governing boards of such state colleges and universities are either elected by the people or appointed by the govenor. In either case the governor is empowered to fill board vacancies by appointment. Michigan Constitution of 1963, Article III, Sections 5 and 6.

Thus, as stated in OAG No. 0092, March 10, 1966, "There can be no question but that members of the Board of Regents of the University of Michigan are state officers." Attorney General, ex rel Book v. Burhans, 304 Mich. 108, 1942). And the same would be true of other state institutions of higher education.

Turning to officers of the state colleges and universities it is clear that, while their duties and responsibilities do not encompass the establishment of broad policy reserved to the governing board, they actually have greater involvement in the negotiation, execution

and administration of contracts entered into by the institution. For example, the board may select a bank in which to deposit its funds, but it is the officers that have direct and regular contact with officials and employes of the bank. Disputes regarding interpretation of terms of deposit, time of deposit, amount of deposit or bank charges are generally resolved by the institution's officials and not by the governing board unless the dispute assumes major proportions. Also, while board members serve part time devoting the major portion of their activities to other matters, the officers of the institution are normally required to devote their full time and attention to the university's affairs. It would be an anomalous quirk of the law indeed were board members of an institution prohibited from having a conflicting interest in a state contract while no such prohibition applied to its officers. Thus, if the policy upon which the constitutional prohibition against conflict of interest rests is to be meaningful, it must be applicable to the very state officials who might be in a position to violate it.

Therefore, since establishment and maintenance of state institutions is an exercise of the sovereign functions of the state pursuant to its constitution and, since officers of such institutions are engaged in the implementation of this exercise of sovereign power, it is clear that they are state officers within the contemplation of Article IV. Section 10 of the State Constitution.

The specific officers of the subject educational institutions so included are its president, secretary, treasurer and vice-presidents.

The president is designated in Article VIII, Sections 5 and 6, as the principal executive officer of the institution and is ex-officio a member of the board so that there is no doubt of his status as a public officer.

While not specifically designated in the Constitution, the delegation to the other officers of universities and colleges of a portion of the sovereign power in which the public is concerned contains the requisite elements to bring them within the ambit of the constitutional prohibition against conflicts of interests.

Consequences of Conflict

Turning next to your question as to the consequences that could ensue where a state officer is found to be in conflict of interest, the constitutional provision, Article IV, Section 10, supra, while self-executing insofar as the prescribed standard of conduct is concerned, also provides that the Legislature shall further implement this provision by appropriate legislation. Consequently there is no

doubt that the following provision of the Michigan Penal Code, Section 122 of Act 328 PA 1931; MSA 1962 Rev Vol §28.317; CL 1948 §750.122, is valid and enforceable:

"No trustee, inspector, regent, superintendent, agent, officer or member of any board or commission having control or charge of any educational, charitable, penal, pauper, or reformatory public institution of this state, or of any municipality thereof, shall be personally, directly or indirectly, interested in any contract, purchase or sale made for, or on account, or in behalf of any such institution, and all such contracts, purchases or sales shall be held null and void; nor shall any such officer corruptly accept any bribe, gift or gratuity whatever from any persons interested in such contract; and it is hereby made the duty of the governor or other appointing power, upon proof satisfactory of a violation of the provisions of this section, to immediately remove the officer or employe offending as aforesaid; and the offender shall be guilty of a felony."

This section of the Penal Code, it will be noted, refers to three consequences that can ensue where it can be established that a conflict of interest is present. First, the contract itself is declared to be "null and void"; secondly, the officer is subject to removal from office, and thirdly, upon conviction thereof, the officer is guilty of a felony.

It is recommended, however, that any prosecuting authority before whom such complaint may be brought take into consideration the fact that this problem has been awaiting formal legal clarification, and that until the issuance of this opinion there has been considerable uncertainty as to whether the described activities amount to a conflict of interest.

Section 2 of Act 317, PA 1966; MSA Cur Mat §4.1700(2), also prohibits any state officer from having any interest in a contract with the state or any of its political subdivisions which is in substantial conflict with the proper discharge of his duties in the public interest. And this statute left undisturbed the second and third of the consequences flowing from a violation of Section 122 of the Michigan Penal Code, supra, by providing, as it does in Section 7 thereof, MSA Cur Mat §4.700(7), that:

"The failure of a state officer or government employe to comply with this act subjects him to appropriate disciplinary action or civil action."

In addition, it should be noted, under Article V, Section 10 of the Michigan Constitution of 1963 the governor has the power and

the duty to remove or suspend from office any public officer, elective or appointive, "for gross neglect of duty or for corrupt conduct in office, or for any other misfeasance or malfeasance therein." There can be no doubt that any public officer who has an interest in any contract which is prohibited by Article IV, Section 10 of the constitution is subject to such removal or suspension by the governor.

However, Section 5 of Act 317 states that:

"If the attorney general finds that a contract contains a direct or indirect interest that causes a substantial conflict of interest, the contract is not void but is voidable by the state or political subdivision. A party who entered into a voided contract in good faith and without knowledge of the existence of a prohibited interest therein may recover from the state or political subdivision the reasonable value of any benefits conferred upon the state or political subdivision in good faith reliance upon the contract." (MSA Cur Mat §4.170(5))

Thus, with respect to the status of the contract, there appears to be an irreconcilable conflict between Section 122 of the Penal Code as to the officers and institutions covered therein, and Section 5 of Act 317, PA 1966. A contract cannot be "null and void" and be "not void but voidable by the state or political subdivision" at the very same instant. Applying the proper rule to statutory construction reserved to such circumstances, City of Detroit v. Michigan Bell Telephone Company, 374 Mich. 543 (1965), it is my opinion that Act 317, being a later expression of the Legislature is controlling despite the absence of a repealing clause. The contract would thus be voidable.

FOOTNOTES

Section 3 - Opinions of Attorney General

1. 1894 Mich. Op. Att'y. Gen. 126.
2. Mich. Comp. Laws § 168.294.
3. Mich. Const., Art. 8, § 5.
4. 1907 Mich. Op. Att'y. Gen. 91.
5. 1910 Mich. Op. Att'y. Gen. 243.
6. 1943-44 Mich. Op. Att'y. Gen. 275.
7. 1897 Mich. Op. Att'y. Gen. 68; 1898 Mich. Op. Att'y. Gen. 41; 1912 Mich. Op. Att'y. Gen. 385.
8. 1951-52 Mich. Op. Att'y. Gen. 430.

9. 1925-26 Mich. Op. Att'y. Gen. 86.
10. 1907 Mich. Op. Att'y. Gen. 111.
11. Unpublished opinion, No. M 173, June 19, 1958.
12. Letter from the Attorney General Kelly to Representative Faxon, July 12, 1968.
13. Opinion No. 46-46, June 18, 1968.
14. Letter from the Attorney General Kelly to Representatives Hampton and Buth, August 27, 1968.

CHAPTER V

STATE FINANCIAL SUPPORT

1. INTRODUCTION

A most important connection between a state government and a state university has become the dependence of the university upon legislative appropriations. Although the state constitution has provided each university with an independent governing board with its own separate corporate existence, the constitution presently provides no university with a separate independent source of funds.

The constitutional issues relating to conditions the legislature may attach to appropriations for university use are considered in Chapters II and III. This chapter is descriptive. The first article from a monograph by Richard Price tells the story of University of Michigan support from the time of its founding until the 1920's. The article by Mr. Lederle describes the modern administrative problems involved in formulating the executive budget and controlling expenditures. Mr. Lederle viewed these problems from an interesting perspective. After being a professor, he was appointed State Controller, and, by the time he wrote the article, he had returned to academic service at the University of Michigan. At present, he serves as the distinguished president of the University of Massachusetts.

The one case in this chapter, *Regents of the University of Michigan v. Turner, Auditor General,* has some historical interest. It certainly reveals the favorable inclinations of the Supreme Court toward the University. The case holds that the interest payable to the University from the proceeds of the original federal land grant should not be decreased by the lowering of the legal rate of interest even though no other rate was ever specifically prescribed.

2. OPINIONS OF ATTORNEY GENERAL

Not only are the universities directly supported by legislative appropriations, but they may also qualify for benefits under many other programs of the state and federal governments. State support under these auxiliary programs usually is based upon opinions of the Attorney General, there being no judicial decisions in this area.

Because of the status of the University of Michigan as a "political subdivision of a state," the Attorney General ruled that the salaries paid its employees were not subject to federal income tax under the provisions in force in 1914.[1] In 1956 the same qualifying status as a "political subdivision" entitled the University to qualify for state airport money for the operation of Willow Run.[2]

The "War Tax" of 1915 imposed on deeds, telephone and telegraph messages, and the like was ruled as not applicable to the University in 1915,[3] but in 1960 the University failed to qualify for exemption from a similar tax on telephone and telegraph service under a much more restrictive exemption clause.[4]

In the year 1924 three rulings were issued which benefited the universities. Goods imported into the country for the use of a university were not subject to federal tax, under the opinions of the U.S. Supreme Court.[5] A university, if it elected, could avail itself of the benefits of the low-cost State Fire Insurance Fund.[6] And, corporate stock given to the then College of Mines at Houghton to be used to finance student loans was not subject to the personal property tax.[7]

In more recent rulings the Attorney General has issued opinions that Michigan Stadium Bonds, although not supported by the full faith and credit of the state, were nonetheless exempt from the state intangibles tax;[8] that the constitutionally earmarked gasoline taxes could be used for access roads for state institutions;[9] and that, under certain restrictions, university employees may participate in the State Employees Retirement Fund.[10]

In a 1957 opinion, it was ruled that students employed at state colleges were not covered by the federal Fair Labor Standards Act, which embraced provisions for the payment of a minimum wage, because the colleges were not engaged in commerce and because a state college is a political subdivision of a state.[11]

3. EXCERPTS FROM THE FINANCIAL SUPPORT OF THE UNIVERSITY OF MICHIGAN: ITS ORIGIN AND DEVELOPMENT, by Richard R. Price (Harvard Bulletins in Education, No. 8, 1923, pp. 26-45.)[1]

PART II

ANALYSIS OF THE FINANCIAL SUPPORT OF THE UNIVERSITY

CHAPTER III

THE ORIGINAL UNITED STATES LAND GRANT

IT will be remembered that the university endowment consisted first of a township of land, afterwards increased to two townships, and of three sections of land granted by the Indians in the Treaty of Fort Meigs. The federal grant of two townships amounted to 72 sections, or 46,080 acres. This, of course, has no connection with the 240,000 acres subsequently granted to the state by the federal government for the purpose of an Agricultural College. In Michigan the Agricultural College and the State University are separate institutions. The acreage of land granted to the several states by the federal government for educational and various other purposes may be verified by consulting a mimeographed document issued by the General Land Office, Department of the Interior, entitled "Land and Scrip Granted to States and Territories for Educational and Other Purposes."

Before taking up the history of the university federal land grant, let us dispose, in passing, of the matter of the Fort Meigs Indian land. The trustees of the 1821 university sold these three sections, and the proceeds, together with some additional gifts and subscriptions, can be traced finally to a lot and building on Bates Street in Detroit. This property passed into the hands of the Board of Education of Detroit. In 1858 the Board of Regents of the University recovered the property by a Supreme Court decision and subsequently sold it for $22,010. This amount, with perhaps four or five thousand dollars of gifts and subscriptions, would then represent the final value of the Indians' gift. This money, at least up to 1875, was kept separately as a reserve fund for the use of the University library.[1] Later

[1] Ten Brook, *op. cit.*, p. 138. See also Hinsdale, *op. cit.*, p. 24.

it was all spent for other purposes considered then more pressing.

A typical instance of poor management in the disposal of university lands is to be found in the matter of the Toledo lots. The trustees of the university of 1821 in 1827 located six "river lots" at the confluence of Swan Creek and the Maumee River, then in Michigan, now in Ohio. This land is now in the heart of the city of Toledo. The lots contained 916 acres, which the trustees accepted as 1280, or two sections, as they were required to locate not less than one section in any one piece. In 1830 the Board exchanged the most valuable of these lots, those numbered One and Two, for other less valuable land in the immediate neighborhood. Four years later the Board sold this land received in exchange to the former owner for $5000. The remaining 621 acres at Toledo were sold between 1849 and 1855 at an average of nineteen dollars an acre. "The Toledo lands, which might have brought the university some millions altogether, brought about $17,000."[1]

The Board of 1821 located twenty-three sections of the university land. The remaining sections were chosen by the Board of 1837. This land was scattered through most of the counties of the state that had been organized up to 1844. The locations were generally advantageous.[2]

The two townships of land conveyed by Congress to Michigan as an endowment for a university, when compared with the amounts since granted to other states, were by no means exceptional in quantity. On the contrary, very many of the states now occupying the place of the old Northwest Territory have received much larger appropriations for the same purpose. If the grant to Michigan has been productive of exceptional results, it is owing to the fact that lands were selected of exceptional value. With so much wisdom, indeed, had the lands been chosen, that in ten years from the time the grant had been made, they were estimated by the Superintendent of Public Instruction to have attained an average value of $20 per acre.[3] As a matter of comparison, it may be stated that of the twenty-seven public land states, nineteen received each two townships of land for university purposes; while of the remaining eight, Alabama, Florida, Wisconsin, and Minnesota each received four townships; Mississippi and Ohio three townships apiece, Tennessee 100,000 acres, and Utah 200,000 acres.[4]

In the first Report of the Superintendent of Public Instruction, January, 1837, he estimated the value of the university land at not

[1] Ten Brook, *op. cit.*, p. 109.
[2] *Ibid.* See also Hinsdale, *op. cit.*, p. 21.
[3] C. K. Adams, as quoted by McLaughlin, *op. cit.*, p. 22.
[4] Hinsdale, *op. cit.*, p. 19.

less than $15 an acre, or $691,200, with an annual income of $48,384; or more probably $20 an acre, or $921,000, with annual interest of $64,912. He added his opinion that in any event it could not fall short of his lowest estimate and believed that it would exceed his highest computation.[1] The event showed, however, that he had not taken into account the fact that the control of the land was vested in a political body—the state legislature.

In March, 1837, the legislature authorized the Superintendent of Public Instruction to sell at auction so much of the university lands as should amount to the sum of $500,000, with the proviso, however, that none of the land was to be sold at a price lower than $20 an acre. In pursuance of this enactment, during that year sales amounting to more than $150,000 were made, and the land brought an average price of $22.85 per acre. Now came a series of persistent assaults on the university property and a period of rather discreditable yielding on the part of the legislature to self-seeking public pressure. When in 1837 the Superintendent came to sell the university land, he found much of it in the possession of squatters. These persons had no shadow of a legal right or claim, but some had been in possession for years and had craftily made improvements. Naturally, since the university land had been well chosen, these were choice pieces of property. On an attempt being made to oust these squatters they raised such a clamor that the legislature yielded and in March, 1838, released 10,240 acres of university land that had been located in 1830. Although the University was allowed to take in exchange as good lands elsewhere, it suffered a double loss: it lost eight years in which the best lands in the state went off the market, and it lost the appreciation in value of its own lands for the eight years. In 1839 the legislature went a step further and authorized the sale at $1.25 an acre of large quantity of the university lands that had been occupied by settlers. Fortunately the Governor vetoed this Act. In 1838 and 1839 the legislature passed a comparatively innocuous measure extending the time of payment to purchasers of university lands. In 1840 hard times struck the new state and the legislature authorized the sale of nearly 5000 acres of this land at an average price of $6.21 per acre. This brought to the University some $65,000 less than would have been realized at the minimum price of 1837. This act was passed as relief for persons who had settled on university lands. In 1841 the minimum price was reduced to $15 an acre, and in 1842 to $12 an acre. But as a final blow, this last act was made *retroactive.* It granted new appraisals of land already sold and repayment of overcharges. In 1843, $34,651 had been either returned or

[1] Ten Brook, *op. cit.*, p. 116.

credited to purchasers. The total sales up to this time had been about $220,000. All these relief and retrospective acts reduced the amount realized for the University to about $137,000, which is some $83,000 less than the amount for which the lands had been actually sold. This does not include the reduction in the price of the land made in 1841 and 1842.[1] After this recital of legislative acts it would seem that little commentary is called for as to the wisdom of vesting control of lands or similar property for educational endowment in a political body like a legislature,—a body which in all history has been prone to succumb to the political pressure of the moment, without too much thought of the future, ultimate, and permanent consequences of its immediate acts. A body such as a board of trustees or regents, whose interests and concern were solely in the guardianship of the real welfare and prosperity of the university, would, perhaps, as a matter of expediency, considering the circumstances of the population, have yielded merely to the extent of prolonging the times of payments on the university land. This would have done the University no harm, for it did not need all the money at that time, and in due course of events, as the state recovered its prosperity, the full value of the land would have been realized for the university endowment.

In the ways sketched above the so-called "permanent endowment" of the University of Michigan was established and continues even unto this day. It is a fund inviolable and not to be diminished, the interest of which only is available for university expenses. In 1882, when all the university lands except 287 acres had been sold, the fund amounted to $543,317.66. The average price per acre received for the entire quantity sold up to that time was $11.87, or more than twice that received for any other educational grant in the Northwest Territory.[2]

On June 30, 1920, the endowment fund amounted to $547,489.40 and the annual interest was $38,428.89. This is probably the ultimate status of the endowment fund and of the annual interest. It should be noted that the annual interest includes not only the amount paid by the state, but also interest on unpaid balances paid by purchasers of university land.[3]

An interesting question may be raised here, and that is, what has actually become of the money thus paid into the state treasury to form the university permanent endowment. In 1853 the legislature directed the proper officer to pay to the University at stated

[1] Report of State Superintendent of Public Instruction, 1880, pp. 354-356.

[2] Knight, *op. cit.*, p. 144.

[3] Financial Report, University of Michigan, 1920, pp. 8, 34.

intervals, "the entire amount of interest that may hereafter accrue upon the whole amount of University lands sold or that may be hereafter sold." This act was limited in its effect to two years, but it was repeated with the same limitations in 1855, 1857, and 1859. In 1861 a similar act passed without limitation. One effect of these acts directing state officers to pay interest on the moneys that came into the state treasury from the sale of University lands, was to create a credit on the one side and a debt on the other. In other words, the state borrowed the university fund, or permanent endowment, and expended it for state purposes, pledging itself to pay the interest thereon. The interest is paid in four installments each year at the rate of seven per cent.[1] It would appear, therefore, from the facts as set forth by Hinsdale that the entire university endowment has disappeared, having been expended by the state for state purposes. It exists now only as a book item on which the state obligates itself to pay seven per cent annual interest. In other words, the endowment from the United States, instead of being an aid to the tax payers by relieving them of that much of university support has actually been transformed into a permanent state debt. This has apparently come to pass because the management of the fund has been in the hands of the biennial legislature instead of in the hands of Regents or independent trustees. In the latter case the funds would have been invested under proper safeguards, and at regular intervals the loans would have been repaid or bonds would have matured and the principal would thus have reverted to the fund. The endowment would then be actually in hand as a tangible possession. The interest would relieve the people by that much of taxation. As it now is, the people of Michigan are taxed to pay annual interest on an endowment which was given them freely by the government of the United States. They must now pay the interest plus the additional support of the university. Compare this with the policy pursued by certain other states, where these endowment funds were placed in the hands of separate trustees or investment boards, who, under strict legal safeguards, invest and reinvest the funds and turn over the interest to the beneficiaries. Such boards are always able to show either the money in hand or gilt-edged securities to its full value. Of course, in the case of Michigan the money is perfectly safe, for the whole credit of the state is pledged for the payment of the interest, and the interest is of more importance to the university than is the principal; but the fact remains, nevertheless, that the people are not relieved of any of the support of the university by the United States, which was the purpose of the endowment.

[1] Hinsdale, *op. cit.*, p. 25.

Section I, article XIV, of the Michigan constitution pledges the specific state taxes, except those of the mining companies of the Upper Peninsula, to the payment of interest on the university endowment and the interest on other trust funds in the keeping of the state. The state Supreme Court has decided, 1896, that when the Act creating the debt to the university was passed, the Legislature must have intended that it should bear interest at seven per cent and that a mere change of the legal rate of interest in the state could not nullify the legislative intent.[1] This of course means, that regardless of the fluctuations in the price of money as reflected by interest rates, the state of Michigan must always pay interest on the university endowment at the fixed rate of seven per cent.

It should be noted here that the University of Michigan was supported from its founding to the year 1867 on the income of its endowment and the fees derived from students,—with the exception of the $100,000 loan of 1838, the circumstances of which will be detailed later. There was no support from the legislature, then, until 1867.[2] Obviously then, until the latter date the institution was not in any real sense a *state* university. It was still a United States land grant university. The true conception of a state university had not yet been grasped by the people. It was not until 1867 that the true basis was established which has been maintained ever since.

CHAPTER IV

THE LEGISLATIVE $100,000 LOAN OF 1838

The university of 1837 as founded had a large potential endowment but no money. Money was needed at once to erect the university buildings at Ann Arbor and to provide the necessary running expenses. The Regents therefore made application to the Legislature for a loan against the credit of the endowment. This loan was granted in 1838 to the amount of $100,000 and took the form of certificates running twenty years and bearing six per cent interest. The university was to pay the annual interest and to repay the principal at maturity from the university fund, that is, from the proceeds of the land grant. The Regents received a premium of $6000 on these bonds. They spent the whole amount in carrying on the university branches already established and in erecting the buildings at Ann Arbor.[3]

[1] Regents of the University of Michigan *vs.* Auditor-General, 109 Michigan Reports, 124; as cited by Hinsdale, *op. cit.*, p. 26.

[2] Hinsdale, *op. cit.*, p. 56.

[3] Hinsdale, *op. cit.*, p. 24. See also Ten Brook, *op. cit.*, p. 126.

For several years the income of the university fund was almost wholly consumed in paying the $6000 annual interest on this loan. In 1844 the Legislature authorized the acceptance of depreciated state obligations at par in payment for university lands, and applied these payments on the university debt. The state also accepted certain Detroit real estate at $8,095 toward this indebtedness. In 1848 the debt had been reduced in this manner to a little over $20,000. In 1852 the whole debt had thus been paid. Then the point was raised that the trust fund granted by the United States had by these proceedings been illegally and improperly diminished. In 1859 the Legislature, therefore, directed the Auditor-General to pay the university "interest on the entire amount which has heretofore been or may hereafter be received by the state for university lands sold or contracted." This action had the effect of restoring the fund to its original status. To clinch the matter, the Legislature of 1877 directed that $100,000 should be added to the university fund on the books of the state. This made the loan finally a gift from the state, with the exception of the $6000 annual interest which had been paid for some years by the Regents.[1] Whether the university did or did not ever repay the loan to the state has been the subject of a considerable historical controversy. The point is now of no practical importance, being merely a problem in technical accountancy.

With the proceeds of the $100,000 loan the Regents prepared to erect the first buildings at Ann Arbor. The Legislature, in the university organic law of 1837 had authorized the Board to procure suitable plans for buildings, which had to meet the approval of the Governor and the Superintendent of Public Instruction. The Regents thereupon employed an architect from New Haven, who drew up "truly a magnificent design," involving the expenditure of over half a million of dollars, or twice the whole sum then realized from the land grant. The plan was accepted by the Regents and approved by the Governor, but the Superintendent refused his assent. He urged that the plan would absorb so much of the university fund as to cripple it in all time to come; and also that a university did not consist in buildings but in the number and ability of its professors and in its other appointments, as library, cabinets, and works of art. This Superintendent, it will be remembered, was that same Mr. Pierce who had been so influential in forming and organizing the educational system of the state in the first constitutional convention. This present action brought upon his devoted head a storm of denunciation. There was great indignation especially at Ann Arbor. The Regents

[1] Ten Brook, *op. cit.*, pp. 126-133. See also Hinsdale as cited in the preceding note, and Knight, *op. cit.*, p. 144.

finally receded and adopted a much less ambitious and expensive plan.[1] It is a pleasure to record that Mr. Pierce lived long enough to have his sensible veto of the over-ambitious plans fully vindicated and to regain his merited esteem in the eyes of his fellow citizens. Thus ended this tempest in a tea pot.

CHAPTER V

THE STATE PERMANENT MILL TAX

The first appropriation from the State for the benefit of the University was made in 1867. At this time the university fund had about reached the limit of its growth and student fees had already been increased. Expenses were increasing, there was an era of high prices following the Civil War, and the university found itself with a growing student body and in an impossible position. Recourse was therefore had to the Legislature for relief. To the credit of that body be it said that the relief was promptly forthcoming. The 1867 Legislature granted the University the proceeds of a tax of one-twentieth of a mill on the dollar on all the taxable property of the state. This brought in $15,000 or $16,000 a year. But the Legislature saw fit to couple with the appropriation bill an amendment providing that the Regents must use part of the money for installing at least one professor of homeopathic medicine. This caused great alarm in the university medical school. The Regents, however, declined to accept the grant on these terms as tending to establish an undesirable precedent of legislative interference in the internal affairs of the university. In 1869 the Legislature, after some recrimination and censure of the Regents, granted the $15,000 a year without any conditions; and also turned over to the university the funds that had accumulated under the Act of 1867. By these Acts and by the Act of 1871 perpetuating the $15,000 a year appropriation and granting $75,000 for a new lecture and class-room building, the Legislature firmly established the precedent and principle of state aid to the university.[2]

The legislature of 1873 granted the University $25,000 for the completion of University Hall, and $13,000 to cover a deficit in revenue for the year ending in June, 1873. It also repealed the Act granting the University $15,000 a year and adopted a new one giving the institution the proceeds of a tax of one-twentieth of a mill on each dollar of taxable property in the state. This was to be a regular

[1] Hinsdale, *op. cit.*, p. 30. See also Ten Brook, *op. cit.*, p. 135.
[2] Farrand, *op. cit.*, p. 185.

and permanent tax for the support of the University, and as such it continued in force for twenty years. The Act became a law without the approval of the Governor, who believed that the University should render an account of its trust and receive its maintenance appropriation every two years.[1] Any unprejudiced observer who will read the subsequent history of the university will, it is believed, concur in the opinion of the present writer that the Governor in this case was wrong. Those who were responsible for the institution's management could now plan definitely for years ahead on a certain fixed income. It is difficult to plan a university's growth and development on a hand-to-mouth basis. Growth must be foreseen, systematic development must be projected, needs must be anticipated by allocation of funds, and orderly and symmetrical progress must be sustained. None of these things can be done properly without exact knowledge of available and continuing funds over a term of years. Without this, enlightened and progressive management becomes mere opportunism. Under the biennial appropriation system, a temporary popular reaction against the university over some comparatively trivial matter, if it should by unhappy chance coincide with a session of the legislature, might bring about almost irreparable damage through the withholding of necessary funds. The University of Oklahoma suffered this very thing from the legislature of that state in its 1921 session. Moreover, the continuing mill tax has the inestimable advantage that as the state grows in population and wealth, and the increasing demands upon the university call for increasing support, the proceeds of the mill tax are also automatically enlarged.

It has already been stated that the Legislature of 1873 fixed the mill tax at one-twentieth of a mill, and this levy raised a sufficient amount for the support and maintenance of the University until 1893. In the latter year it was found necessary to raise the levy to one-sixth of a mill. In 1899 the rate was made one-fourth of a mill.[2] In 1907 the rate was again raised to three-eights of a mill, and in 1921 to six-tenths of a mill. This last rate was applied to a new equalized valuation of the state which was increased in 1921 to $5,000,000,000. Thus the new mill tax will yield $3,000,000 a year for support. In addition, the Legislatures of recent years have made appropriations of considerable amounts for building purposes.[3] It will be seen from all this that the mill tax as a source of maintenance and support for the university seems now to be a fixed principle of the fiscal policy of Michigan.

[1] *Ibid.*, p. 218.

[2] Hinsdale, *op. cit.*, p. 153.

[3] From a letter to the writer, dated October 24, 1921, from Mr. S. W. Smith, Secretary of the University of Michigan.

In Table 1 is given a statement of the annual proceeds of the mill tax at five-year intervals. It will be remembered that the increments represent not only certain increases of rate but also periodic increases in the state valuation. Some slight variations are due to variations in date of payment from the state to the university treasurer.

TABLE 1. ANNUAL PROCEEDS OF THE MILL TAX, UNIVERSITY OF MICHIGAN. BY FIVE-YEAR PERIODS[1]

Year ending June 30	Mill Tax	Year ending June 30	Mill Tax
1873	$ 15,000	1903	$ 315,620
1878	31,500	1908	520,230
1883	40,500	1913	858,000
1888	35,454	1918	1,155,000
1893	70,625	1920	1,818,750
1898	221,020		

CHAPTER VI

LEGISLATIVE DIRECT APPROPRIATIONS

It has already been pointed out that, outside of the $100,000 loan of 1838, the state Legislature contributed nothing to the support of the university until 1867. It was assumed in 1837 that the avails of the congressional land grant would be abundantly sufficient to found a university and to maintain it on a large scale. Competent authorities estimated that the endowment would yield a capital of at least a million dollars and an annual income of $60,000,–which indeed it would have done if wisely and honestly handled. In considering this annual income it is well also to bear in mind the fact that there was not then a college in the country that enjoyed an annual income equal to $60,000 a year.[2] The plans and expectations of those days, then, were certainly justified by what men know of the circumstances and prospects of the other colleges of the country.

The first appropriation from the state treasury was made in 1867, $15,000 a year, which was brought in by a one-twentieth of a mill tax on all the taxable property of the state. As has been pointed out, this tax was renewed biennially for a time and then was finally made a permanent tax. But it must not be assumed that this

[1] Compiled from Reports of the President, the Superintendent of Public Instruction, and Financial Reports of the University.

[2] Hinsdale, *op. cit.*, p. 152.

was the limit of the state's generosity. From time to time special appropriations were made for specific purposes, such as for meeting deficits in the university's income or for the erection of needed buildings. One thing should be said here about the latter item. In theory the mill tax was supposed to meet the university's needs for maintenance and also for buildings. In practice, as the university grew rapidly, it was often found impossible to provide the necessary buildings out of the stated current income. In those emergencies it was customary to appeal to the state for help, and this help was usually forthcoming. The Homeopathic Medical School was for years given a special annual grant of $6,000. In an address made by President Angell in 1879, he stated that the total sum received by taxation for the University from the state treasury down to January, 1879, was $469,000. This was not more than the buildings, grounds, museums, and libraries were then worth. The sums set aside from the mill tax for buildings were usually denominated in the official reports as "Savings for Buildings." These savings are not included in the statement of the proceeds of the mill tax given in Table 1. In Table 2 we have summed up and consolidated all of the state appropriations for the University of Michigan from 1867 to 1900. This will then include all state grants from the beginning up to 1900, with the sole exception of the $100,000 loan of 1838.

TABLE 2. STATE APPROPRIATIONS, 1867-1900. UNIVERSITY OF MICHIGAN[1]

Law of 1867, 1/20 mill, two years	$ 30,797
Law of 1869, $15,000 a year for 5 years	75,000
1873-1893, 1/20 mill	803,862
1893-1899, 1/6 mill	1,121,700
1899, 1/4 mill	276,295
To cover deficit, 1873	13,000
To pay outstanding warrants, 1875	13,000
Appropriations for specified Buildings and Improvements	553,289
Homeopathic Department	238,750
College of Dental Surgery	129,750
University Hospitals	93,500
Books for libraries	79,000
Special salaries	36,600
Repairs and contingent expenses	125,125
Unclassified	78,766
Total	$3,668,434

[1] Hinsdale, *op. cit.*, p. 153.

From Table 2 it will be seen that in the thirty-three years between 1867 and 1900 the state made very considerable additions to the amounts allowed the university through the adopted system of state aid by a mill tax. Most of these additional contributions were for buildings or for the provision of special or additional functions, but nevertheless there were occasions when the Legislature was

TABLE 3. UNIVERSITY OF MICHIGAN, INCOME FROM SPECIAL LEGISLATIVE APPROPRIATIONS AND SAVINGS FROM MILL TAX FOR BUILDING PURPOSES, 1901-1920.[1]

Year	Mill Tax Savings for Buildings*	Special Appropriations For Maintenance†	Special Appropriations For Buildings
1901	$ 36,048	$ 6,000	....
1902	71,298	9,000	....
1903	167,960	12,000	$ 25,000
1904	98,905	9,000	25,000
1905	39,452	....	....
1906	80,000	15,000	....
1907	44,375	9,000	....
1908	99,000	9,000	....
1909	252,214	9,000	....
1910	324,866	9,000	....
1911	17,780	9,000	....
1912	8,989	9,000	37,000
1913	128,500	9,000	50,000
1914	127,235	9,000	198,000
1915	83,000	9,000	320,000
1916	50,000	9,000	55,000
1917	20,385	9,000	250,000
1918	35,000	9,000	95,000
1919	....	109,000	215,000
1920	....	200,000	325,000
Totals	$1,685,007	$468,000	$1,595,000

* The savings from mill tax for building purposes are derived from savings from the mill-tax income remaining in the hands of the State Treasurer from year to year, and are available for buildings and permanent improvements. The amounts shown in this column in Table 3 are the amounts received from the State Treasurer and are in addition to the mill-tax receipts shown in Table 9.

† With the exception of appropriation for deficit in current expenses of $100,000.00 in 1919 and $200,000.00 in 1920, all amounts in this column are for the maintenance of the Homeopathic College and summer hospitals.

[1]Compiled from annual Reports of the Superintendent of Public Instruction, and Financial Reports of the University. These figures have been carefully checked and corrected through the kindness of Mr. S. W. Smith, Secretary of the University of Michigan.

called upon to make up deficits in the ordinary running expenses of the institution. The proceeds of the mill tax from 1873 to 1920 have already been given in Table 1. It remains now only to give the extra or special legislative appropriations from 1901 to 1920 in order to present a complete conspectus of the state support of the university. It will be observed that Table 2 lumps the respective sums under their proper heads without attempting to apportion these amounts through the years. In Table 3 is presented a statement by years and general items of the extra or special appropriations from 1901 to 1920 inclusive. There is also included a statement of savings from mill tax devoted to building purposes. It will be observed that most of these appropriations are for buildings and repairs. Under the item of Special Appropriations there is always included an annual grant of $6,000 for the Homeopathic Medical School, which the Regents had refused to establish out of the regular state appropriation. In the last two years there will be noted some large grants to make up deficits in current expenses.

CHAPTER VII

STUDENT FEES

The University of Michgian, in common with other state universities, was founded on the fundamental idea of free tuition. It is interesting to observe in the history of this institution how circumstances compelled a modification of this idea, at least to the extent of collecting from the students a contribution toward the incidental expenses attending instruction. The fees thus levied on students were increased from time to time as the exigencies of university finance demanded until today the students are making quite a respectable contribution toward their own education. It is carefully pointed out, however, that these are not tuition fees; the odious term tuition fee is avoided by labeling the contribution with the specious title, "annual tax." Other state universities have had the same experience, and the "incidental fee" has now generally ceased to be merely nominal and has apparently become a permanent feature of university life. Any protest on the part of legislators, alumni, or other interested persons, is met with the irrefutable argument that the authorities were driven to take this step of increasing the charges by the necessity of making the budget balance; and that the Regents are perfectly willing to lower the fees if the legislature will make up the resulting deficit.

Up to 1865, every student of the University of Michigan,

resident or non-resident, paid a matriculation fee of $10 and an annual tax of $5. In that year the matriculation fee for non-residents was raised to $20, and in 1866 to $25. In the latter year also the annual tax for all students was made $10.[1] The annual tax was increased again in 1874, 1878, 1882, 1884, and 1896. The matriculation fees were left unchanged. In 1882 the scale of fees was as follows:

STUDENT FEES, 1882[2]

Matriculation:	
Resident	$10
Non-Resident	25
Annual Tax	
Literary Department:	
Resident	20
Non-Resident	30
Law Department:	
Resident	25
Non-Resident	35

The fees for the Medical Department, Homeopathic College, Dental College, and Pharmacy School were the same as for the Law Department. Extra charges were made for laboratory material, instruments, etc.

In 1896 the annual tax for students of the Department of Literature, Science and the Arts was made $30 for residents and $40 for non-residents. In the professional departments the fee was $35 for residents and $45 for non-residents. The diploma fee remained unchanged at $10. In 1905 the Regents advanced the annual fee in all professional schools by $10, but no change was made in the Department of Literature, Science and the Arts.[3] By 1920 we find the scale of fees to stand as follows:

[1] Farrand, *op cit.*, p. 173.
[2] President's Report, 1882, p. 19.
[3] Hinsdale, *op. cit.*, pp. 149, 370.

STUDENT FEES, 1920[1]

Matriculation

	Michigan Students		Non-Residents	
	Men	Women	Men	Women
All Colleges and Schools . . .	$ 10	$ 10	$ 25	$ 25

Annual Fees

College of Literature, Science and Arts	49	45	69	65
Colleges of Engin. and Architecture	64	60	94	90
Medical School	107	103	127	123
Law School	74	70	84	80
College of Pharmacy	64	60	84	80
Homeopathic Medical School	107	103	127	123
College of Dental Surgery . . .	114	110	134	130
Graduate School.	49	45	69	65

We find in the scale of fees for this year of 1920 two novel features. One is that the fees run into odd dollars or uneven numbers. The other is that an unexplained discrimination is shown between men and women students in the amount of the fee charges, the women being favored in every instance. Whether this discrimination is meant to show in a delicate manner that women are incapable of deriving as much benefit from instruction as are men, and therefore should not pay so high a fee, the documents do not show.[2] One is struck also by the wide variety of fees charged in the several schools and colleges. A certain amount of uniformity would create a more favorable impression of the institution. A rational scheme would seem to be to charge one fee for the Literary Department and another fee for all of the professional schools, with the possible exception of the Medical School, where higher operating costs would justify a markedly higher fee. It should be noted that in the fee scale quoted above, the fees for the two medical departments include the laboratory fees.

[1] Catalogue of University of Michigan for 1919-1920, Vol. XXI, No. 39, p. 107.

[2] It is quite probable that the additional amount charged the men is for club or Union or athletic dues, or some similar activity, the men having more elaborate or expensive facilities than the women.

In a supplement pasted into the University Bulletin for 1919-1920 we find a change of fees, to take effect in 1921, announced as follows:

STUDENT FEES, 1921[1]

Matriculation Fee (unchanged)

Annual Fees

	Michigan Students		Non-Residents	
	Men	Women	Men	Women
College of Literature, Science and Arts	$ 80	$ 76	$105	$101
Colleges of Engin. and Architecture	95	91	120	116
Medical School	140	136	165	161
Law School	105	101	125	121
College of Pharmacy	95	91	120	116
Homeopathic Medical School	140	136	165	161
College of Dental Surgery	140	136	175	171
Graduate School	80	76	105	101

Summer Session

	All Students
Colleges of Literature, Science, and the Arts, of Engineering and Architecture, of Pharmacy, and the Graduate School	$26.50
Medical School:	
Laboratory and Demonstration courses	21.50
Clinical courses	31.50
Law School	31.50

The annual fees for the regular university year include the laboratory fees charged separately heretofore. A cash deposit is required to cover cost of material and unusual breakage in the laboratory of chemistry, hygiene, and bacteriology. In the summer session, laboratory fees are charged extra.

It will be recognized at once, of course, that this relatively large increase of fees was occasioned and, indeed, necessitated by the enormous increase in the cost of all services and commodities which educational institutions use, that immediately followed the close of the Great War. All colleges were forced to adopt unusual expedients to tide over the emergency.

[1]Catalogue for 1919-20, Vol. XXI, No. 39.

In Table 4 is given a statement of the receipts from student fees at ten-year intervals from 1845 to 1915, with the additional item of the receipts for the years 1920 and 1921. The statement is slightly inaccurate because the different records do not agree in every respect as to the amounts received under this head. The variation is explained by the fact the amount would naturally vary a little through belated payments on any given date; and also because in the records the receipts from students are usually lumped with small "receipts from other sources." These small discrepancies, however, will not materially distort the result.

TABLE 4. RECEIPTS FROM STUDENTS BY TEN-YEAR PERIODS, 1845-1921[1]

1845	$ 403.94	1895	$141,888.34
1855	3,344.84	1905	221,285.97
1865	20,580.78	1915	457,411.04
1875	29,255.00	1920	682,445.16
1885	69,789.07	1921	938,886.55

CHAPTER VIII

GIFTS AND BEQUESTS OF INDIVIDUALS

President Angell, who for so many years represented the university in its relations with the state and with the alumni as well as with the outside world, made it a point to emphasize in his recurring annual reports that the University of Michigan was a legitimate object of the benevolence or munificence of its friends and well-wishers, whether among the alumni or the general public. He referred often to the great stream of gifts and bequests that was flowing in ever-increasing volume to the great Eastern endowed universities and colleges, and asked why this kind of support should be so conspicuously lacking to a state university. The obvious answer is, of course, that men of wealth do not feel moved to contribute to the support of an institution that has behind it the resources of a great and wealthy state. However, the appeal could be made more successfully for things which a legislature may not reasonably be asked to provide out of public taxation. Therefore bequests and gifts gradually began to be made of collections of books, a natural history collection, an art collection, an athletic field, an auditorium, a dormitory,

[1] Compiled from the Financial Reports of the University, and from Reports of the President and the State Superintendent.

a memorial building. The most notable gift of recent years was the Men's Union, costing over a million dollars, the contribution of thousands of alumni. As the first generations of Michigan alumni began to make their way in the world and to acquire wealth, gifts began to increase for endowment, for scholarships and for various specific trust purposes. The appeals of President Angell were no longer in vain. The generosity of the state was being matched by the grateful generosity of the recipients of its educational bounty. Of the total value of the university's land and buildings in 1921, 31 per cent had been given by alumni and friends. One of the great achievements of the administration of President Hutchins between 1909 and 1919 was the organization of the alumni body with special reference to participation in the financial burdens of the university. On June 30, 1921, there were in the hands of the university treasurer trust funds consisting of gifts and money for special purposes, mostly from alumni, to the sum of $967,634.95.[1]

[1] Financial Report for 1921, p. 45.

4. THE STATE AND HIGHER EDUCATION: A REPORT FROM MICHIGAN, by John W. Lederle, *Director, Institute of Public Administration, University of Michigan*[1]

This statement by John Lederle, formerly Controller of the state of Michigan, portrays relations between the state and higher education as they have developed in one of our principal states. It reflects a view that has gained increasing strength among state officials and students of administration—that there is much to be said for decentralization of authority in public as well as private administration.*

AT THE OUTSET I should like to express great sympathy for the objectives of your committee. I abhor any trend to extend governmental controls in such a way as to endanger the initiative and imagination of leaders of higher education. I oppose vehemently a philosophy, seemingly held by some state budget officers, that all educational institutions should be cast in a common mold, subjected to standardization, and left no room for experimentation and differentiation.

I assume that you would want me to make some comments on the problems of government and higher education as seen from the

*Prepared for delivery before the Committee on Government and Higher Education, Baltimore, Maryland, on March 1, 1958.

government end of the spectrum. Toward the end of this discussion I will, of course, return to the university end of the spectrum and add additional Michigan examples of dissatisfaction with external controls.

It was quite an experience for me to go from the relatively quiet setting of a university professorship of public administration to the hot seat of Michigan state controller, responsible, under the governor, for preparing the state's budget, for exercising the various follow-up controls associated with budget execution, and for handling such central housekeeping functions as accounting, purchasing, motor transport, and capital outlay construction. An ex-professor controller suddenly discovers that higher education—hitherto the center of his universe—is only one of many state functions competing for the taxpayers' dollar. He is besieged for funds on all sides. The department of conservation wants 100 additional forest rangers and shouts that if it does not get them, there may be a conflagration which will destroy hundreds of thousands of trees, irreplaceable in our lifetime. The state police point to the mounting death toll on the highways and indicate the millions they must have to put an end to this holocaust. And the department of mental health—to hear this department's well-intentioned representatives talk, we must forthwith construct a roof over the entire state, since all citizens are on the verge of mental breakdowns and will need hospitalization. Basically sympathetic to higher education, the ex-professor controller suddenly finds himself forced to initiate decisions as between higher education and other worthwhile government services. Having done so his task is not over, for he must then make recommendations whereby the figure for all higher education is allocated among the various colleges and universities in the state system.

It is impossible to give higher education all that it ideally could use and requests. As the level of services which people demand of their state government rises, the competition for limited revenues becomes more severe. In Michigan we have not only the competition between higher education and the demands of mental health, state police, and conservation, for example, but the decline of the real property tax at the local level has led to increasing competition for state funds between state agencies on the one hand and local school and municipal agencies on the other. Higher education faces particularly severe competition from the public secondary and elementary school people, who today draw substantial state support rather than rely wholly on local real property taxes. In this highly competitive atmosphere, state budget officers, governors, and legislators are understandably asking more and more detailed questions about the management and programs of public colleges and universities.

Michigan's two constitutionally independent universities have not readily accepted this situation. It seems to me that they have sometimes failed to appreciate their "public" character, one crucial aspect of which is public accountability and administrative life in a "goldfish bowl." The plain fact is that our universities are in "politics" and what they do is of concern to the outside public which foots the bills. As a political scientist this does not disturb me, for I view politics not as an evil thing but as an influence which can help universities to improve.

In Michigan there is mounting criticism of the veil of secrecy with which our constitutionally independent universities have often surrounded themselves. For a number of years the two university governing boards refused to open their meetings to the public. The press was critical of these closed sessions and alleged a "right to know." Belatedly the governing boards did give in. However, neither constitutionally independent institution makes its internal operating budget available to the public, or for that matter, to the budget office, governor, or legislature. Specific requests for information are promptly complied with, but the entire document, from which the whole picture of the educational operation could be gauged, is not available. This secrecy, unique to the two universities, does not set well with state officials and legislators, or with the press. One does not have to be around the state capitol for long before he hears numerous antagonistic comments about the "fourth branch" of state government. While there are great reservoirs of good will, some cracks are appearing.

Your staff has been accumulating nation-wide evidence which may indicate a more and more questioning attitude toward public colleges and universities generally. A past president of the Association of State Budget Officers told me recently that at their annual conferences there has been a hardening of critical comments by the membership. From an attitude of "Let's get together and work things out," which he says budget officers had a very few years ago, he now reports a change to an attitude that might be described as "You can't work with the colleges and universities, so let's go ahead on our own and knock them down to size." As Arthur Naftalin told you last year, budget people do not see higher education as unique. They are not likely to treat it as sacrosanct. They must allocate limited funds between competing services and are not for putting higher education on a pedestal.

Not only is higher education in severe competition with other governmental services, with the obligation of first establishing its over-all portion of state appropriations, but individual colleges and universities are in competition with each other for that portion of

total funds to be allocated to higher education. The scramble for funds among the colleges and universities, always well publicized by the press, often hurts the prestige of higher education.

Because in Michigan our six separate boards governing nine institutions reach little, if any, advance agreement, the battle for funds sometimes has descended to the level of name-calling between competing institutions. On occasion clientele groups have been marshalled and the pressure on the legislature has been so severe that the legislative attitude has in a few instances become one of "a plague on all your homes." If public higher education in Michigan could agree and present a common front, some of the fumbling, inept questions raised by budget officers and legislators would never be asked. External investigators are particularly likely to look for duplication and waste when colleges and universities get away from their primary and unique function of teaching and research, into television, extension, and a variety of off-campus service activities. Single state boards of higher education to co-ordinate the separate institutions are not an absolute answer, any more than a single department of defense is the final answer to interservice rivalries. But colleges and universities in a particular state must maximize areas of agreement so as to present a common front. It is unseemly and ruinous to fight each other.

So much for comments on the way relations between government and higher education in Michigan look from the government end of the spectrum. Now let us turn to the opposite end. The two constitutionally independent universities, which receive their funds in a lump sum, have been singularly free to handle their own accounting, purchasing, and other administrative arrangements without external interference. However, in the capital outlay area, the legislature has more and more seen fit to tie up release of construction funds by requiring clearances from the state's building division. Also, self-liquidating projects which used to be authorized by the governing boards independently, now need legislative advance approval, even though they do not involve expenditure of state funds, and even though any taxpayer liability, should they go sour, would be moral rather than legal. However, up to now such approval has been automatic and perfunctory.

I should mention one new development, namely recent appeals to the legislature by each of the constitutionally independent universities for special projects which, when granted, come in the form of a line item. Beginning with a special agricultural marketing program at Michigan State University in 1954 there has followed a traffic administration center and a labor and industrial relations center at the same university. The University of Michigan, a little slow in the up-take and perhaps fearing the implications of the line item for special

projects, has only this current year begun to push this approach in earnest. It has presented requests, which have been included in the governor's budget recommendations, for funds for an institute of labor and industrial relations, a Great Lakes research institute, a program of research and service for small business enterprise in Michigan, and an institute of science and technology. If, as some observers have felt, the University of Michigan and Michigan State have been unusually fortunate in having flexibility of educational management because of lump sum appropriations, we are witnessing a perceptible trend away from this in recent requests for special program items. One cannot be certain whether funds for these programs could only have been obtained on a line-item basis. Enthusiasm for line-item programs might dissipate rapidly if hindsight indicates them to be an incursion upon the concept of lump-sum appropriation. One gets the impression that some educators are going overboard on the salable, categorical programs at the expense of more central institutional objectives. Perhaps we are only witnessing here what has been true for a long time in the capital outlay area; namely, that it is easier to get a legislature to appropriate for medical and science buildings than for music and library buildings.

In contrast to the two constitutionally independent universities, the other institutions present requests for funds after submitting a detailed proposed operating budget which is gone over by budget officials and legislative committees. They receive their operating funds not in a lump sum but under the three headings of (1) salaries and wages, (2) contractual services, supplies and materials, and (3) equipment. When it comes to spending their funds, these schools are subject to central accounting procedures, centralized purchasing controls, and central motor pool surveillance. They do, of course, control their own personnel practices.

In preparing for today's session I took pains to ask a number of Michigan college administrators how central state controls look to them. Do these officials feel that they are being assisted or are they being improperly circumscribed? On the whole there can be no question that Michigan external controls are more wisely exercised than external controls in most states. I am convinced however that from the worm's eye point of view; rather than from the state controller point of view, there is plenty of room for improvement. There is many a slip between the statement of policy by the state controller, expressing sympathy for vesting large discretion in the educational institutions, and the actual carrying out of this policy by the personnel of the central controlling department. Time and again during my period in Lansing, when conflicts between departmental personnel and educational institutions were called to my attention, I found it

necessary to reverse over-zealous centralist activities by my staff. Some staff members were real martinets. There are those who assert that there is a congenital tendency on the part of central purchasing, accounting, and budget people to get beyond their depth and to violate the principle of service which they avow as their reason for being. I believe there is much truth in this claim. External control personnel, particularly those in the lower ranks, tend to "go by the book" and frequently show little real judgment or discretion. Their frame of mind emphasizes negative values.

Let me briefly run over some of the headaches and criticisms which the institutions, other than the constitutionally independent schools, have brought out.

I believe the basic complaint is related to the legislative practice of appropriating under the three headings mentioned above. Even though the gross appropriation is adequate, the schools cannot transfer moneys from any one of these three major accounts to the other in the interest of efficiency and flexibility to meet changed conditions. In one of our smaller institutions, whose enrollment has more than doubled in five years, tight budgeting has consistently underestimated enrollments by as much as twenty per cent of total enrollment. The legislative policy for this institution encourages accepting all qualified applicants, but the school's administrators are handicapped by another legislative policy which prohibits transfers. Consequently, school officials hang on tenterhooks as they push through deficiency bills, not knowing until May of the fiscal year whether the legislative leaders will pick up the check for the deficit. As another example, one college controller told me that the "no-transfer" rule sometimes leads to spending $300 from the salaries and wages account to build a supply cabinet which could have been bought for $100 from the exhausted equipment account.

There is much complaint about unrealistic application of student-teacher ratio figures by budget personnel. Certainly Ferris Institute, with its extensive trade-technical program, and the University of Michigan, with its large graduate and professional program, should have student-teacher ratios which differ greatly from those suitable for schools where more traditional, essentially undergraduate, programs dominate. Yet budget examiners do not make those distinctions and many an attempt to quantify and compare institutions turns out to be a *non sequitur.*

There are complaints about capital outlay controls. All educators are very conscious that budget office cuts in totals for new buildings may be necessary in view of current limited state capital outlay resources. However, the students will shortly be in college; additional construction will be too late and at inflated prices.

While the schools generally like central motor transport facilities, they are less happy about the central purchasing unit. There are the usual complaints about long delays in receiving materials ordered. When central purchasers exercise their right to differ on specifications by adding a phrase permitting substitution of "or equal" products, the schools claim they get some pretty inferior substitutions. They are almost bitter over recent attempts by the state purchasing and accounting divisions to codify expenditures by materials groupings, and to apply these new account titles to all institutions, whether they be hospitals, prisons, state police posts, or educational institutions. In this way, instructional materials for pharmacy or chemistry classes are classified under the code as "hospital supplies," instructional materials used at the one institution teaching cosmetology are classified as "housekeeping supplies," and trade and industrial class materials are coded as "maintenance supplies." One college controller told me that he had to keep two sets of books with separate classifications, because the state-imposed classifications did not give the true picture of educational operations. I could go on. Suffice it to say that the climate is one of ferment—the relationship between educational institutions and external control agencies is uneasy, though not bitter as in some states.

I should like now to make some constructive suggestions on how higher education might proceed so as to secure improved relations with government. Your committee is doing a fine job of accumulating the criticisms and gripes. But this is essentially a negative approach. In the end you will no doubt wish to consider a positive program. Although I have not given this the years of thought that most of you have devoted to the subject, I would like to present four suggestions which I believe you might well include in any action program.

First, you should look at your campus educational role, and improve programs in public administration so as to raise the level of public service and turn out better potential government administrators.

Second, you should focus on the statutory jungle which governs external administrative control procedures in almost every state to the end of developing improved laws, if not model laws, for accounting, purchasing, budgeting and so forth.

Third, you should approach the national professional associations of state budget officers, purchasing officers, controllers, etc., talk over mutual problems, and in an atmosphere of frank discussion seek to improve relations.

Fourth, higher education itself should demonstrate a very real concern about economy and efficiency, rightly defined, which

concern will make unnecessary many of the external controls presently being experienced. Let me now discuss each of these suggestions in greater detail.

Higher education can do much through its professional training programs to assure that we get better informed, professionally trained government officials. As I read the parade of horribles set forth in the early studies of the Committee, I am not so much depressed by the fact that these are improper interferences with higher education as I am by the fact that they represent violations of current administrative doctrine, whether applied to higher education or to any other function of government. The pressures for centralized purchasing, for co-ordination of state expenditures for higher education through central budget preparation and executing agencies, for central supervision of capital outlay construction, etc., were based on a desire to improve the economy and efficiency of state government and to put an end to evils associated with wide dispersion of authority. But when external control agencies hamper rather than promote, when they unduly delay, as seems so often the case, their rationale disappears.

What is needed is better trained professional purchasing agents, budget officers, accounting officials, who recognize that they are not the main reason for government, but necessary evils. Applied to higher education they must come to understand that education is one of the major functions of government and that purchasing or budgeting or accounting or personnel officials have a supporting rather than dominating role. Where there is a conflict between external control officials and those responsible for carrying out such a major governmental function as education, doubtful cases should be resolved in favor of the views of the major function officials. In cases of doubt, it is only with the greatest of temerity that the external control officials substitute their judgment for that of the major function officials who have the ultimate responsibility for getting the job done.

Of course, whether there is doubt, is often a question. Even within educational institutions there are frequent conflicts between central administrative officials and the functional departments which are engaged in teaching and research. If you question this, you should read the delightful book by William G. Morse, the former Harvard purchasing officer, entitled *Pardon My Harvard Accent.* In this book he describes with much humor the difficulties he experienced in attempts to economize and standardize and save money at Harvard. Professors have their idiosyncrasies and some are absolutely certain that they cannot write except with Venus lead pencils or with Parker ink, even though the purchasing officer contends that he can get off-brand products of equal quality at a much cheaper price. If

the professor insists on a Zeiss microscope while the purchasing officer contends that a Bausch and Lomb microscope is just as good and costs much less, we get into a somewhat more doubtful realm. If I were the purchasing agent I would be inclined to overrule the professor on the pencils and ink but would be inclined to give him his head on the microscope, on the theory that *he* is doing the research and will have to live with the microscope through the years. But other purchasing officers would very likely consider his desires for the more expensive microscope as being an idiosyncrasy which should be overruled. Even ink may be a doubtful case for I have heard librarians complain about the ink that purchasing has wasted its money on.

Recent management literature has shifted the emphasis away from centralized managerial controls. Hierarchical values, while important, are being challenged by new concepts such as "Bottom-up Management." Present thinking is that we should decentralize, that the role of central control officials is to assist the departments and agencies and encourage them to develop their own control units. In purchasing, in budgeting, in personnel management, the new emphasis is to reverse the centralist trend of a few years ago. The federal Hoover Commission and most state Little Hoover Commissions have stressed decentralization.

Fifty years ago a U.S. forest ranger could not sell a cord of wood without advance clearance from Washington. Not so long ago there would be long delays in the settling of minor claims arising from collisions between army vehicles and civilian motor cars due to centralized control procedures. Today these matters are handled quickly in the field, without the frustrating delays and increased possibility of error that would have been involved under previous more centralized procedures. Maybe the present generation of state external control officials are out of touch with these trends. However, it is up to higher education to make sure that our future graduates, many of whom are bound to move into external control positions, acquire a proper understanding of the primary responsibility of the major function agency to resolve the doubtful questions. The trend away from centralization of managerial controls is a confirmation of the axiom that not all roads should lead to the state capital.

Turning now to my second suggestion, I have the impression that the laws dealing with accounting, purchasing, capital outlay, etc., laws which state officials are enforcing, are frequently outdated, inconsistent, and as unpalatable to these officials as they are to the universities and colleges. It seems to me that the time is ripe for a frontal attack with the objective of modernizing these laws in particular states or of developing model laws which might be adopted rather generally by the several states.

As Michigan's state controller, I discovered that much of our accounting legislation was very ancient, adapted more to the horse and buggy days, than to the present. But in my short tour of duty I found no way to marshal support for a complete face lifting. Paradoxically, Michigan had created a shiny-new central department of administration with the hope of introducing sound business management in state government, but had left the new department with moss-encrusted accounting laws which proved a constant source of frustration. Well do I remember an attorney general's opinion, rendered late in the fiscal year, which suddenly informed all state agencies through the department of administration that it was no longer sufficient to order supplies and materials and encumber the appropriation within a fiscal year. There must be actual delivery of the ordered goods within the fiscal year. If there should be failure of delivery only for a few days beyond the end of the fiscal year the funds would lapse. A new request for funds would have to be justified and pushed tortuously through the legislature. This particular attorney general's ruling raised complete havoc. Yet no matter how sympathetic the state controller and his subordinates might be, it was necessary to apply the ruling to all agencies including the colleges and universities.

In the purchasing area modern practice calls for delegating to the agency the authority to make small purchases within the local community without going through central competitive bidding procedures. Yet in many states the central purchasing people insist upon central handling of even the smallest purchase. While in some instances they may require this out of pure cussedness, I suspect that at other times their hands are tied by law. Not infrequently statutes governing competitive bidding eliminate all discretion. Your committee might well explore the legislative jungle which governs external control procedures to see what can be done about making a better statutory environment for relations between higher education and government.

As a third suggestion, it seems to me that there are many possibilities for improving relations between higher education and government through conversations with the professional associations of government officials. The state budget officers, state purchasing officers, and other groups have national organizations. It should be possible to get the viewpoint of higher education expressed by speeches at their national conferences. Joint committees to study common problems might be helpful. In a particular state, where there is a rather benighted state official riding herd on the colleges and universities, it may be possible to educate him through the admonitions or ribbing of his professional colleagues from the outside. After all, while he

may not be willing to listen to complaints from university representatives from his own state, many times he will react to the comments of his professional colleagues from other states.

Finally, if there is any truth to the old adage that a good offense is the best defense, it seems to me that it may well have application in connection with the relations of higher education to external control officials. If the philosophy of decentralization, about which I have been talking, is actually to be implemented, it is up to the universities to demonstrate that they are as much concerned about efficient and economical management as are the advocates of external controls. Carping criticism will get nowhere in the face of strong public demand for economy and efficiency in state government. There can be no doubt that colleges and universities have much to learn. With no harm to institutional objectives they could save public funds by paying greater attention to modern business practices. While Michigan's two constitutionally independent universities are on the whole very efficiently run, they could learn much from studying procedures that have been developed by the state department of administration. The state motor pool, maintained by the department of administration, for example, makes cars available to operating agencies for 5½¢ a mile and is completely self-supporting. As a professor at the University of Michigan, using the University of Michigan motor pool, my unit is charged 7¢ a mile. What are the reasons for this difference in cost? They are worth exploring. In these days of taxpayer concern about rising governmental costs, external controls over higher education are bound to expand unless leaders of higher education can convince the public that they have as much concern about operating costs as any external control official could ever have. This concern must be communicated to the public and internal administrative procedures must be tightened so as to reflect the concern.

Although the situation may look black at times, in any struggle between a prominent state university and state officials, never underestimate the power of the university. In Michigan, at least, it takes considerable temerity for a legislator to attack one or the other of the two major state institutions. The institutions have tremendous prestige, and their alumni, both of the real and of the synthetic variety, are likely to remember criticisms of their favorite school when voting at the next election. Of course, much of the interference with universities occurs in the less public atmosphere of bureaucratic decision-making, and hence, it is not always easy to crystallize support for the university's viewpoint. However, let me remind you that if you are on the university end, you are probably exaggerating your helpless situation. Believe me when you are on the external-control-

end, you feel that the best cards are in the hands of the leaders of higher education. I have no doubt that if you take pains to get your story across, you will win the day.

5. JUDICIAL DECISION

Regents of the University of Michigan v. Turner, Auditor General

109 Mich. 135, 135-39; 66 N. W. 956 (1896)

HOOKER, J. Certain lands granted by the Federal Government to the State as an endowment to the State University having been sold by the State, the fund resulting therefrom constitutes the university fund. A similar provision exists for primary schools, while State land grants for the endowment of the State Normal School and the Agricultural College have resulted in funds for the support of these institutions. It is the custom of the State to pay interest upon such funds annually, the same having been paid from specific taxes. See Const. art. 14, § 1. Act No. 114, Laws 1845, provided for the payment of interest upon the primary school fund, at a rate therein specified, viz., 7 per cent. This act was repealed in express terms. See Rev. Stat. 1846, p. 736.

Rev. Stat. 1846, p. 216, § 8, provides for interest for the university and primary school funds in the following language:

"Upon all sums paid into the state treasury on account of the principal of the university or primary school funds, except where other provision is or shall be made by law, the treasurer shall compute interest from the time of such payment, or from the time of the last computation of interest thereon, to the first Monday of April in each and every year, and shall give credit therefor to the university or primary school interest fund, as the case may be, and such interest shall be paid out of the general fund."

Laws 1847, p. 173, Act No. 107, makes provision for interest upon these funds from the annual state tax upon railroads. Laws 1851, p. 116, Act No. 99, § 10, provides for the payment of interest upon the various educational funds. See, also, Laws 1853, p. 85, Act No. 60; Laws 1855, Act No. 73; Laws 1857, Act No. 56.

Laws 1859, p. 397, Act No. 143, being 2 How. Stat. § 5360, provides:

"That the auditor general be, and he is hereby, required to credit to the university interest fund, interest from and after the thirty-first day of December, eighteen hundred and sixty, on the entire amount that has heretofore been, or may be hereafter, received by the State for university lands sold or contracted, and to draw his warrants upon the state treasurer for the same, who is hereby required to pay the same to the treasurer of the university upon his application therefor, from time to time, as the said interest may accrue, and be required for the use of the university."

Section 5361 is as follows:

"The people of the State of Michigan enact, that upon all sums paid into the state treasury upon account of the principal of any of the educational funds, except where the provision is or shall be made by law, the auditor general shall compute interest from the time of such payment, or from the time of the last computation of interest thereon, to the first Monday of April in each and every year, and shall give credit therefor to each fund, as the case may be; and such interest shall be paid out of the specific taxes."

Thus, it will be seen that at no time has the law fixed the rate of interest to be paid upon these funds in express terms, except by Act No. 114 of the Laws of 1845, which was repealed, as stated, the next year. During all of the time since 1845, up to the present year, 7 per cent. upon the several funds has been paid by the State, and, up to the year 1887, 7 per cent. has been the rate of interest established by the usury laws. In 1887 the general statute was changed, and the legal rate of interest upon money was then fixed at 6 per cent., where it has since remained. See Act No. 138, Pub. Acts 1887; Act No. 156, Pub. Acts 1891.

The relators ask a writ of *mandamus,* to compel the payment of 7 per cent. upon the university fund. The question before us is, therefore, a construction of the statutes referred to. It appears to be conceded that the several laws providing for the payment of interest upon the university fund contemplated its computation at 7 per cent., that being the legal rate. It is a general rule of construction that, where an act is passed for a particular purpose, it is not abrogated by general legislation, sufficiently broad to include it, unless the intent to abrogate it is clear, under the maxim, *"Generalia specialibus non derogant." Earl of Derby* v. *Commissioners,* L. R. 4 Exch. 226; *Kidston* v. *Insurance Co.,* L. R. 1 C. P. 546; *Conservators of River Thames* v. *Hall,* L. R. 3 C. P. 419; Endl. Interp. Stat. § 223, and cases

this case, unless we are to say that the legislature intended that the legal rate should be paid upon the fund, whatever that rate might be. We think it more reasonable to say that, when those acts were passed, the intention was to pay interest at the then-existing legal rate, which was 7 per cent., and that the general statute was made a part of these several acts by reference, which reference must necessarily be implied, as there could be no other means of determining the rate intended. The rule in such cases is that such adoption does not include subsequent additions or modifications of the statute so taken, unless it does so by express intent, and that the repeal of the statute adopted will not affect its operation as a part of the statute adopting it. *Schlaudecker* v. *Marshall,* 72 Pa. St. 200; *Nunes* v. *Wellisch,* 12 Bush, 363; *Knapp* v. *City of Brooklyn,* 97 N. Y. 520; *In re Main Street,* 98 N. Y. 454; *Allen* v. *Mayor, etc., of Savannah,* 9 Ga. 286; *U.S.* v. *Paul,* 6 Pet. 141; *Kendall* v. *U.S.,* 12 Pet. 524; *Clarke* v. *Bradlaugh,* 8 Q. B. Div. 69; *Darmstaetter* v. *Moloney,* 45 Mich. 621.

The latter case is as closely analogous to this as it could well be without raising the identical question before us. In that case the charter of the city of Detroit provided that "the assessor * * * shall be, and is hereby, vested with the powers and duties of supervisors, as provided by the laws of this State" etc. It will be noticed that this does not specifically refer to any particular statute or statutes, but in a general way it adopts such as prescribe the duties of supervisors, and it cannot be doubted that the effect would have been the same had the words "as provided by the laws of this State" been omitted, as they would have been clearly implied. It might as well be said in that case that the legislature intended that the duties of the assessor should change, like those of supervisors, with changes in the law fixing the duties of the latter, as to say in this case that the legislature intended that the rate of interest to be paid upon the educational funds should change from time to time, with changes made in the usury laws, because the act providing for the payment of such interest failed to fix a specific sum as the rate to be paid, or to specifically mention the then-existing law fixing the legal rate of interest, which was unnecessary. This court held in the case cited that changes in the duties of supervisors did not affect the assessor of Detroit, saying:

"The case falls under the rule that a piece of legislation for a particular city, which adopts, under general words of reference, a specific regulation in a separate general law, is not to be taken as adopting prospectively the future alterations in the provision of the general law so appropriated, unless the intent therefor is express or strongly implied."

It is reasonable to suppose that the framer of the interest law had not in mind the question of interest upon educational funds, and, if he had, there is nothing to call attention to that subject in the bill or title; and while we do not say that this would be fatal to the bill, or exclude the respondent's contention, if the intent were manifest, the construction here given to this act is in harmony with the spirit of the Constitution, which provides safeguards against concealed or unintended legislation.

These principles seem to us conclusive of the question, and the writ will issue as prayed, but without costs.

The other Justices concurred.

FOOTNOTES

Section 2 - Opinions of Attorney General

1. 1913-14 Mich. Op. Att'y. Gen. 543.
2. 1955-56 [vol. 2] Mich. Op. Att'y. Gen. 251.
3. 1915 Mich. Op. Att'y. Gen. 261.
4. 1959-60 Mich. Op. Att'y. Gen. 38.
5. 1924-26 Mich. Op. Att'y. Gen. 94.
6. 1925-26 Mich. Op. Att'y. Gen. 13.
7. 1915 Mich. Op. Att'y. Gen. 447.
8. Unpublished opinion, No. 22923, dated March 20, 1942.
9. 1951-52 Mich. Op. Att'y. Gen. 115.
10. 1951-52 Mich. Op. Att'y. Gen. 234; 1955-56 Mich. [vol. 2] Op. Att'y. Gen. 127.
11. Unpublished opinion, No. 3022, dated June 12, 1957.

Section 3 - Excerpts from Richard R. Price's Article

1. Permission to quote given by both *The Harvard Bulletin on Education* and The Harvard University Press.

Section 4 - John W. Lederle Article

1. Reprinted from THE CAMPUS AND THE STATE, by Malcolm Moos and Francis E. Rourke, 1959, published by Johns Hopkins University Press. (Pages 325-38)

CHAPTER VI

EMINENT DOMAIN

1. INTRODUCTION

Under our form of government private property cannot be taken from the owner except for a public purpose. The courts have affirmed that use by a public university constitutes the required public purpose.

In *Brooks,*[1] the property involved was to be the site of the Lawyers' Club of the University of Michigan Law School. The Lawyers' Club is used mainly as a student dormitory, and, apparently this use was challenged because at that time the lodging of students was almost exclusively the function of private boarding houses, some of which were probably condemned to make way for the Lawyers' Club. The court, however, had no trouble in sanctioning this use of condemned land, and to show how far the University must go, the court seemed to have no more difficulty approving the construction of an 18-hole golf course on condemned land in *Pommerening.*

The tenants of a hotel about to be condemned in the *Hooper* case would have had a right to challenge the "necessity" of the taking in a condemnation case, but, when the owners agreed to sell the property to Wayne University, the tenants had no standing to challenge the sale.

In the final case in this chapter, the Michigan Court of Appeals affirmed the right of the Board of Trustees of Western Michigan University to condemn land adjacent to the University campus for use as a nature park. The court rejected as "foolhardy" the contention that the taking of land for such a use was not necessary for the welfare of students who are no longer interested in the "birds and the bees."

The statutes setting forth the procedure in these condemnation cases are appended to this chapter.

2. JUDICIAL DECISIONS

The People ex rel. The Regents of the University of Michigan v. Brooks

224 Mich. 45, 46-53; 194 N. W. 602 (1923)

McDONALD, J. This is a review by certiorari of certain condemnation proceedings had in the circuit court of Washtenaw county. An alumnus of the university of Michigan proposed to the regents that he would contribute a million and a half dollars for the construction of a building to be used for law school purposes, and to be known as "The Lawyers' Club." The regents accepted the proposal and arranged with the State administrative board for the money with which to purchase a portion of two blocks immediately south of the campus as a site for the building. Eleven property owners refused to sell, and it became necessary for the board of regents to endeavor to acquire the title by judicial condemnation. By resolution of November 24, 1922, they declared the taking of this property a public necessity for use of the university and directed the attorney general of the State of Michigan to institute condemnation proceedings. A petition was filed, trial was had, and on February 6, 1923, the jury rendered its verdict, finding a public necessity for the taking of the property and awarding the defendants damages in various amounts, totaling $230,874. The court entered an order confirming the verdict. Six of the property owners accepted the amount awarded them and made deeds to the university. Five are here seeking a review of the proceedings.

The first question presented by the record is stated by defendants in their brief as follows:

"The statute under which the proceedings were brought is unconstitutional, to the extent that it attempts to authorize proceedings in behalf of the regents of the university of Michigan, because the title of the statute is not broad enough to authorize the enactment of such authority."

The proceedings were brought under Act No. 236 of the Public Acts of 1911 (1 Comp. Laws 1915, § 349 *et seq.*), the title of which reads as follows:

"An act to authorize proceedings by the State to condemn private property for public use."

The following provisions of the Constitution of the State of Michigan form the basis of defendants' objections to the title in question.

"No law shall embrace more than one object which shall be expressed in its title." * * * Const. 1908, Art. 5, § 21.

"The regents of the university and their successors in office shall continue to constitute the body corporate known as "The Regents of the University of Michigan.' " Art. 11, § 4.

"The board of regents shall have the general supervision of the university and the direction and control of all expenditures from the university funds." Art. 11, § 5.

"The regents of the university of Michigan shall have power to take private property for the use of the university in the manner prescribed by law." Art. 13, § 4.

It is argued by the defendants that the title only authorizes proceedings by the State, that "The Regents of the University of Michigan" is a constitutional corporation, independent of the State, separate and distinct in its authority, and, therefore, the title does not indicate that one of the objects of the legislation is the taking of private property by that corporation. While it is true that "The Regents of the University of Michigan." more commonly called the "board of regents," is a separate entity, independent of the State as to the management and control of the university and its property, it is nevertheless a department of the State government, created by the Constitution to perform State functions, and the real estate which it holds, or acquires, is public property belonging to the State, held by the corporation in trust for the purposes of the university which are public purposes. See *Auditor General* v. *Regents of the University,* 83 Mich. 467 (10 L. R. A. 376).

In support of their conception of the legal character of this corporation, counsel for the defendants seem to rely on *Weinberg* v. *Regents* of the University, 97 Mich. 246. A careful reading of the opinion of Justice GRANT in that case will show that the decision is based solely on the constitutional right of the regents to the absolute and exclusive control of all university property. That right has been recognized by every judicial decision of this court in which this question has been considered. It has become the well settled purpose and policy of the law. But it has not been held that the university was not a State institution, or that the real estate which the regents

are authorized to acquire and hold for university purposes is not property of the State. The following cases are of interest on the history of the university and the constitutional powers and duties of its board of regents. *Regents of the University* v. *Board of Education,* 4 Mich. 213; *Regents of the University* v. *Detroit Young Men's Society,* 12 Mich. 138; *Sterling* v. *Regents of the University,* 110 Mich. 369 (34 L. R. A. 150); *Regents of the University* v. *Auditor General,* 167 Mich. 444.

With this understanding as to the character of the corporation, it will plainly be seen that there is here no constitutional objection to the title of the act in question. The one general purpose as expressed in the title and in the body of the act is the same, viz., the condemnation of private property for public use. Every section is germane to the object expressed in the title. It is not necessary for compliance with the constitutional requirement that the various institutions for which the land is to be used should be designated in the title. In *Loomis* v. *Rogers,* 197 Mich. 265, this court, speaking through Mr. Justice STEERE, said:

"If the act centers to one main general object or purpose which the title comprehensively declares, though in general terms, and if provisions in the body of the act not directly mentioned in the title are germane, auxiliary or incidental to that general purpose, the constitutional requirement is met.

"A title is but a descriptive caption, directing attention to the subject-matter which follows."

We think the general object of the act under which this proceeding is brought is sufficiently expressed in its title.

It is further urged by counsel for the defendants that though the act be constitutional in respect to its title, it does not include the board of regents, because it provides that the judgment of confirmation vests the title of the land in the State instead of in the corporation, and requires the proceeding to be brought in the name of the State. In this regard it is the claim of counsel that only the regents in their corporate capacity can hold title to the property, and that the Constitution gives the corporation the right of eminent domain in its own name. It will be observed, however, that this right is to be exercised by the regents in "the manner prescribed by law." The act in question is apparently the attempt of the legislature to prescribe the proceeding necessary to the exercise of this power. We see no constitutional objection to the provision requiring the suit to be prosecuted in the name of the State. It is the manner prescribed by law. The money for the payment of this property was furnished by the State,

and deposited in court by the administrative board for the payment of the judgment. The title to the land was taken and is held by the State, by consent of the board of regents, for the use and benefit of the university. The buildings to be erected thereon are for the use of the people, under the exclusive management and control of the regents. The State alone may not sell it or divert it from the use for which it was acquired. The regents could not sell it if the title had vested in their corporation. It is the public property of the State devoted to a particular public purpose, and whether held by the State or by the regents in their corporate capacity, it is still subject to the absolute control of the latter, and that is all the Constitution requires. Our attention has not been called to any law prohibiting the State of Michigan from holding title to lands for the use and benefit of the university. Inherently it may do so. The right of the regents of the university, however, to take and to hold title in their corporate capacity for the purposes of the university is unquestioned, and, though it is not a constitutional right, if the exercise of that right be necessary to the absolute management and control of the property, to permit the State to take it would be a violation of the spirit and purposes of the provisions of the Constitution, as construed by this court. But as affecting the question of control, it would seem to be immaterial whether the title of real estate be held by the regents or by the State. The mere holding of the title without the right to sell or divert, or to manage or control, could not interfere with the present constitutional powers of the board of regents. It is held by the State subject to the right of the regents, to exclusively control and manage it. There is no constitutional objection to the requirement that title to the land shall vest in the State. If the State may hold the title, the law in question is applicable to proceedings by the regents for the judicial condemnation of land for use of the university. It was plainly so intended by the legislature, and, we think, in its enactment, due regard was given to the constitutional rights and powers of the regents. They are not here questioning it.

The third objection raised by defendants in their brief is "That the use for which the property is being taken is not a public use." The following letter from the donor, supplemented by the testimony of university officials, clearly shows the necessity of the proposed building for use of the students attending the law school:

"To the Board or Regents,
University of Michigan, Ann Arbor, Michigan

"Dear Sirs:—If agreeable to you, I will erect on the two blocks on South University avenue, between South State street and Tappan avenue, a law students' combined club and dormitory building, with

the same advantages as you have extended to other buildings, namely, the university to furnish free heat, light, and power. The building is to be known as 'The Lawyers' Club,' to be governed by five governors, consisting of the dean of the law faculty (who shall be president), and four other governors to be selected by the board of regents from the law faculty. All members of the law school are to be eligible to membership in the proposed club, subject to such conditions as the club authorities may prescribe. All lawyers whether residing in the State or not, and whether previously connected with the university or not, shall be eligible to membership, subject to being elected by governors. All occupants of the building shall be members of the club and shall pay annual dues as the governors may determine, and are to be selected by the dean of the law school from the senior law class. Members of the club not living in the building shall also pay such annual dues as the governors may determine. Going prices shall be charged for rooms and board.

"The proposed building will furnish sleeping and study rooms for one hundred and fifty law students and dining accommodations for three hundred.

"All dues and all profits from the operation of the building shall be used exclusively for legal research work, to be expended from time to time as the governors may deem best. This legal research work will render possible the study of comparative jurisprudence and legislation, National and State, and also of foreign countries, ancient and modern. Such work should be of use in proposed legislation, and besides leading to the production of reliable law treatises and studies, would help to systematize the law as a science. The European plan of giving leisure time to professors to pursue their studies and produce original works, may well be applied in America to professors of law, who at present are absorbed too exclusively in classroom work. A legal research fund could be used to pay part of their salaries, thus giving them time for original research.

"The character of the legal profession depends largely on the character of the law schools. Real lawyers were never needed more than now, and they have grave responsibilities. There never was a time when they had so much power as now. It will be for the lawyers to hold this great republic together, without sacrifice of its democratic institutions.

"Yours very truly,

.....

"April 25, 1922."

The claim that the property to be acquired is not for public use is so plainly without merit that we do not deem it necessary to

The final objection to the proceeding relates to the failure of the jury to allow Rose T. Lueck any damages for the impairment of the value of the east 44 feet of her lot not included in the petition for condemnation. Under proper instructions the court left this question to the jury. The verdict made no reference to damages to the east 44 feet, but awarded a lump sum of $14,000. The evidence taken as to damages, which counsel say is undisputed, is not included in the return, and we are therefore unable to determine the question raised.

After careful consideration of the various questions presented by this record, we are convinced that there is no ground for issuing the writ of certiorari. The writ heretofore issued will be dismissed, with costs to the plaintiff.

WIEST, C. J., and FELLOWS, CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The People ex rel. Regents of the University of Michigan v. Pommerening

250 Mich. 391, 393-98; 230 N.W. 194 (1930)

WIEST, C. J. The university of Michigan is a corporation, vested with right to invoke the power of eminent domain.

For declared educational purposes, the regents of the university, desiring land for an 18-hole golf course, instituted this proceeding to acquire, by condemnation, 10½ acres of defendants' land. A jury in the Washtenaw circuit found the necessity for taking the land and awarded defendants $11,058 compensation. Defendants contested the alleged need, asserted the power was being exercised in behalf of the board in control of athletics of the university of Michigan, a corporate entity, without right to invoke the power of eminent domain, and sought compensation in excess of the sum awarded.

The proceeding to take the land was brought under Act No. 236, Pub. Acts 1911 (1 Comp. Laws 1915, § 349 *et seq.*), authorizing proceedings by the State to condemn private property for public use. The act is silent upon the subject of review. Act No. 149, Pub. Acts 1911 (1 Comp. Laws 1915, § 353 *et seq.*), also authorizes proceedings by State agencies and public corporations to condemn private property for public use. That act provides for review by appeal. Why one act provides for and maps procedure for review, and the other, enacted at the same session of the legislature, is silent on the

subject, when both acts are, in practical effect, in *pari materia,* is not apparent.

Defendants made application for and were allowed to take out a writ of error, and the point is raised that certiorari, and not error, is the proper method of review. Certiorari is the right method and we now so term the review, and proceed as upon certiorari, and, within the limits of such review, to determine questions presented.

The needs of a great educational institution involve no judicial question, except it is made to appear that the desire of those having the management thereof outruns reason, and it is sought to take private property for a purpose foreign to educational purposes. The necessity for taking defendants' land, in order to establish a golf course for educational purposes of the university, was an issue before the jury, and, by verdict, found to exist. The evidence supported the verdict, and we cannot hold, as a matter of law, that in no event can such necessity exist.

The court did not give a requested instruction that the land was wanted for a golf course, but such was the whole trend of the evidence and the admitted purpose of the proceeding, and every one, inclusive of the jurors, so understood. The requested instruction stated no more than the obvious, and there was no error in not giving it. Error assigned upon exclusion and admission of evidence, with one exception, needs no review.

The land taken was but part of defendants' holding. Their land was suitable for platting, and the court admitted testimony that the golf course would benefit the land not taken. This was error. No law so permits, and all holdings forbid. The error, however, so far as possible, was cured by instruction to the jury that such claimed benefit must not be considered in fixing compensation. We cannot find the error reflected in the award. The compensation awarded was less than claimed by defendants and more than fixed by many of plaintiff's witnesses. The award, being within the range of evidence submitted, may not be disturbed under review by certiorari.

It is claimed that no sufficient effort to purchase was made. The statute authorizing the proceeding does not require an effort to purchase, and, in such case, an effort to purchase is not necessary. *Commission of Conservation* v. *Hane,* 248 Mich. 473.

Defendants filed objections to confirmation of the verdict, stating that one juror was not a freeholder and another was disqualified by reason of his interest, as co-owner with Mr. Burke, counsel for plaintiff, in a parcel of land used by witnesses as a basis of comparison as to value. The statute required a jury of resident freeholders and the court ordered such to be summoned. The record shows the examination, by counsel, of the jurors, but no inquiry of whether

they were freeholders, and, at the close of the examination, counsel announced satisfaction with the jury. The qualifications of the jurors should have been inquired into upon the *voir dire* examination, and challenge for cause, if any, then exercised. The objection now made was waived. *Village of Paw Paw* v. *Flook,* 214 Mich. 486, and cases there cited. The objection to the other juror is without merit. A juror is not disqualified by such a trend of evidence at the trial.

In the brief, counsel for defendants put this question:

"Have the board of regents of the university of Michigan, acting through the State, the power to condemn land for the use and benefit of a private corporation, whose funds, not the State's or university's, will pay for the purchase of the property condemned?"

The answer is no. A State agency, vested with power of eminent domain, may not employ the power, directly or indirectly, for the use and benefit of another, unless so authorized by law. But the answer given to the question does not at all decide this case.

The regents, by resolution, declared it necessary, for the development of physical education as an integral part of a broad program of education, to acquire the property for the use of the university, and requested the attorney general to institute the proceeding at bar. The jury found the averred necessity, the court confirmed the verdict, and vested title to the property in the State of Michigan, for the use of the regents of the university of Michigan.

The compensation awarded defendants was deposited in court by the regents. But it is contended that the purpose of this proceeding is to obtain the land for the use and benefit of a corporate entity existing wholly apart from control and management of the regents.

In 1924, under the provisions of Act No. 84, Pub. Acts 1921, and as a creature of the board of regents, a nonprofit corporation was organized for the declared purpose of "The furtherance of general or physical betterment of the students at the university of Michigan, particularly the conduct of intercollegiate athletics in said institution." The name adopted was "Board of Control of Athletics of the University of Michigan." In the articles of incorporation it was also stated:

"Said corporation is to be financed under the following general plan: Funds for operating affairs of the corporation are to be derived from (1) proceeds of sale of tickets for athletic contests; (2) athletic fees collected by university of Michigan and paid to this corporation."

The qualifications required of officers and members were fixed by the articles as follows:

"Election or designation by board of regents as member of governing board or committee in charge of intercollegiate athletics at the university of Michigan."

Supplementing this the by-laws of the corporation provided:

"The business of this corporation shall be the control and management of intercollegiate and other athletics at the university of Michigan; the furtherance of the physical development of the students thereof; the control and management of such property of the university as is now, or may hereafter be, devoted to this purpose, all in so far as the governing body of the university of Michigan has or shall from time to time delegate to the board in control of athletics of said university; the construction or extension of present plant facilities for this purpose; the collection, control and disbursement of all revenues derived from athletic games or contests or any other source."

The secretary of the board of regents, and business manager of the university, testified that he presented to the board of regents the resolution upon which this proceeding was initiated, and from his personal knowledge of the athletic program of the university, "the acquiring of this property is a part of the general program of the athletic development of the university of Michigan at the present time." We omit further quoting of testimony. The evidence clearly establishes the fact that the board in control of athletics of the university of Michgian, while a corporate entity, is but an operating agency of the regents of the university in the management of designated educational activities, and, at all times, under full control of the regents.

We find no reversible error.

Affirmed, with costs against defendants.

BUTZEL, CLARK, POTTER, SHARPE, NORTH, and FEAD, JJ., concurred. McDONALD, J., did not sit.

Hooper v. Board of Education of the City of Detroit

315 Mich. 202; 23 N.W. 2d 692 (1946)

BUTZEL, Chief Justice.

Adeline M. Hooper, plaintiff, a resident of the city of Detroit, Michigan, in a bill of complaint alleged that she resided in the Webster Hall Hotel (and that on behalf of herself and upwards of 570 other tenants she seeks to restrain the purchase of the hotel property and the fixtures and appurtenances at private sale to the Board of Education of the City of Detroit, defendant herein. The property consists of a very large hotel building opposite the campus of Wayne University, which is a part of the educational system owned and conducted by defendant. Plaintiff concedes that proper proceedings to condemn the property were brought in the recorder's court of the city of Detroit, and in which she and 570 tenants, or thereabouts, appeared and categorically denied that there was a public necessity for the taking of the property. While the condemnation proceedings were pending, defendant entered negotiations for a contract for the purchase of the property for $1,200,000, which amount defendant has available. After the bill of complaint was filed, defendant entered into further negotiations with a financial institution for the issuance and sale of self-liquidating revenue bonds in the amount of $2,000,000, which would be amply sufficient to pay the purchase price of the property and the cost of expensive remodeling and improving of the property so as to adapt it for the purposes of the university. There can be no question after reading the record that defendant has reason to believe it very necessary and essential to acquire the property for its purposes, and that the present tenants of the hotel may have considerable difficulty in obtaining suitable new living quarters because of the lack of housing facilities in the city of Detroit. On the other hand, the university in its attempts to take care of over 12,000 students, a large number of whom are returning veterans, and to participate in the national program to increase the number of trained nurses, has a pressing need for the property, as its present buildings are woefully inadequate.

The bill of complaint mainly stresses the claim that, as there is a condemnation suit pending in which the necessity of taking the property is controverted by the present tenants of the rooms of the hotel, the plaintiff and those on whose behalf she has filed the bill are entitled to their day in court in order to have the question of necessity determined.

* * *

Plaintiff claims a right to sue both as a tenant and taxpayer. The defendant concedes that the purchase of the property by the city must be subject to such rights, if any, plaintiff and the other tenants may have obtained from the present owners of the hotel. Her right to sue as a taxpayer has not been questioned in the lower court. After the filing of the bill of complaint, in which many allegations were made on information and belief, a sworn answer was filed by defendant in which it categorically denies some of the charges made on information and belief, and, as to these charges, on motion to dismiss there is no presumption that they are true, inasmuch as the allegations to the contrary in the answer have not been controverted. Case v. City of Saginaw, 291 Mich. 130, 288 N.W. 357. A motion to dismiss the bill of complaint was made and some testimony taken. The trial judge entered a decree dismissing the bill of complaint, and plaintiff appeals. We shall discuss the main questions raised.

The first and main question stressed on appeal is whether defendant can purchase the property during the pendency of condemnation proceedings in which a question of necessity must be passed upon by a jury. The answer is unequivocally in the affirmative. Defendant is a State agency clothed with the power of eminent domain and as such has a right to discontinue condemnation proceedings any time before confirmation of the verdict of the jury. See In re Board of Education of Detroit, 242 Mich. 658, 219 N.W. 614, where condemnation proceedings were also brought, as in the instant case, under Act No. 149, Pub. Acts 1911, as amended, 1 Comp. Laws 1929, § 3763 et seq., Stat. Ann. § 8.11 et seq., which act permits the petitioning body to withdraw any property whenever such will not interfere with the substantial rights of the parties, or it may discontinue the condemnation proceedings before the confirmation of the verdict of the jury. And see In re Huron-Clinton Metropolitan Authority, 306 Mich. 373, 10 N.W. 2d 920, where we permitted the withdrawal of several parcels, as well as the acceptance of some as a gift, and the purchase of other parcels without the determination of necessity. Plaintiff relies on In re Board of Education of City of Grand Rapids, 249 Mich. 550, 229 N.W. 470, in which condemnation proceedings were begun against three parcels of land. During the proceedings one parcel was purchased. The validity of the purchase was not attacked, the court merely deciding that as to the two small parcels not purchased, the condemnation proceedings must be continued. Plaintiff also relies on Detroit v. Judge of Recorder's Court, 253 Mich. 6, 234 N.W. 445, which is not at all applicable. We simply held that in order to transform a park into a wide roadway against the protests of the abutting property owners, who claimed an easement, it was necessary for the city to bring condemnation proceedings

in which necessity would be determined and damages to the abutting property owners on account of the destruction of their easement and to the holders of the reversion would be awarded. There was no purchase of the property involved.

Plaintiff, however, claims that under Article 13 of the Constitution of 1908, "private property shall not be taken by the public nor by any corporation for public use, without the necessity therefor being first determined," et cetera. It will be noted that Article 13 is entitled "eminent domain" and it is obvious that this section refers only to taking of property by eminent domain." It is unquestionably true that where the property is sought to be condemned, the above quoted constitutional provision applies, but it does not apply where property is being purchased.

It was stated in Allen v. Rogers, 246 Mich. 501, 505, 224 N.W. 632, 634: "In this state no man's land can be taken from him for public use except by gift, purchase, or condemnation. If he is unwilling to dedicate it and will not sell for a reasonable price, resort may be had to condemnation."

* * *

The decree dismissing the bill of complaint is affirmed without costs as a public question is involved.

CARR, BUSHNELL, SHARPE, REID, NORTH, and STARR, JJ., concurred with BUTZEL, C. J.

BOYLES, J., concurred in the result.

Western Michigan University v. Slavin

6 Mich. App. 291, 293-97; 148 N.W. 2d 908 (1967)

McGREGOR, J. This appeal arises out of eminent domain proceedings initiated by the board of trustees of Western Michigan University. Appellants own undeveloped and wooded land adjacent to the University's land. There is dispute whether the parcel comprises approximately 40.09 acres or approximately 38 acres of land; however, this difference is not as serious as it could be, as the adjoining land of the acquiring university is also undeveloped and wooded. In May, 1964, the University was granted authority by the legislature to construct resident halls and a food service center to accommodate

1,100 students. In November of 1964, the board of trustees adopted a resolution declaring it would be necessary to take the subject parcel for public purposes.

During the 14½ day trial, which produced a voluminous record, there was introduced widely divergent expert testimony as to the value of the parcel. The appellee introduced two expert witnesses who both testified the highest and best use for the land was for single-family residences, and set the value at $29,200 and $30,000 respectively.

Appellant introduced two expert witnesses who set the highest and best use of the land as for development of multifamily apartment buildings, and set the value at $414,000 and $476,500 respectively. The appellants were prohibited by the trial judge from introducing into evidence a purported sales contract between the appellants and an Ohio corporation, wherein the subject parcel would be sold for apartment-house development for $620,000 less costs of streets, sewers, and water lines on the property.

The jury returned a verdict declaring the necessity of taking the property and set just compensation of $145,000. Judgment was entered confirming that verdict.

This appeal was filed after appellants' motions for judgment notwithstanding the verdict and for a new trial were denied.

This appeal proceeds on several claims of error and theories. Appellants claim error in that the purported sales contract with the Ohio corporation was refused admission by the trial judge, that there was insufficient evidence from which the jury could determine the necessity of taking the subject parcel, that the appellee lacked the necessary authority to condemn the subject parcel, that instructions to the jury on the credibility of witnesses was inadequate, and that the verdict of the jury was inadequate and without evidentiary support.

Evidence of sales contracts or offers traditionally have been suspect as tools in condemnation evaluations. See Annotation, 7 ALR2d 781 (1947). Such evidence is prone to fraud and uncertainty. *Sharp* v. *United States* (1903), 191 US 341 (24 S Ct 114, 48 L ed 211). Certainly such offers must be bona fide and the parties capable of performance. *City of Kalamazoo* v. *Balkema* (1930), 252 Mich 308; *City of Grand Rapids* v. *Ellis* (1965), 375 Mich. 406. In this case, an Ohio corporation purportedly entered into the contract of purchase; however, there was insufficient proof that the corporation could fulfill its obligation under the contract. There is only the unsupported testimony of a witness, who claimed to be an officer of the aforesaid corporation, that he had seen the reports of the corporation and that it had the necessary funds or capital-raising

potential to carry out the purchase. The trial court did not abuse its discretion in refusing to allow the admission of the proffered sales agreement, as there was insufficient foundation laid by the appellant to insure the reliability of the evidence.

The argument was presented by the appellants that the board of directors of Western Michigan University did not present sufficient evidence of the necessity of taking the subject parcel for the question to go to the jury. Appellants argued that the board did not show the necessity of approving a campus development plan encompassing the appellants' land and maintaining land owned by the university, adjacent to the subject parcel, as a recreational and nature-study area. Appellants' counsel argued that today's youth are no longer interested in the "birds and the bees", thus the proposed nature park is foolhardy. It is this Court's opinion that such an argument is unfortunate and ill-informed. The board of trustees of Western Michigan University has the responsibility of maintaining an institution to educate several thousand students. Const 1963, art 8, § 6, PA 1963 (2d Ex Sess), No 48, as amended (Stat Ann 1965 Cum Supp § 15.1120(1) *et seq.*). Its determination of necessity is prima facie evidence of necessity. *City of Allegan* v. *Vonasek* (1932), 261 Mich 16; *In re Acquisition of Land for Civic Center* (1953), 335 Mich 582. There was testimony by the members of the board of trustees and the faculty of the university that the park and recreational areas planned are important to the physical and psychological well-being of the students. The board of trustees declared, and supported with testimony, that it is necessary to the well-being of the students to provide grouped student residential facilities, with open spaces and recreational and park areas close to student dormitories. Such testimony was competent evidence to go to the jury on the question of necessity.

The appellants seem to argue that the proper course for university development is to place future buildings by considering only where there is physical room for them and where the ground is proven capable of supporting such buildings. There was testimony of experts on drainage and sewer facilities that supports the proposition that the proposed park area would be undesirable for dormitories even under the appellants' limited criteria for adequate construction sites. Thus, under the theories of both the appellants and appellee, we find the jury had sufficient basis for the finding that it was necessary for the subject parcel to be taken for a public purpose.

As to the argument that the board of trustees lacked the requisite legal authority to condemn the subject parcel, we find that it had the necessary authority by virtue of PA 1963 (2d Ex Sess), No 48, as amended by PA 1964, No 14 (Stat Ann 1965 Cum Supp

§ 15.1120[8]); House Concurrent Resolution No 61 (1962), House Journal, pp 1302, 1934; and House Concurrent Resolution No 58 (1964), House Journal, pp 850, 1824, which specifically authorized the construction of the new dormitories for Western Michigan University.

The appellants claim that there was an improper instruction as to the credibility of witnesses in that there should have been an instruction that, if the testimony of a witness was false in one regard, it was false in the whole. Appellants' attorney noted his exception to the charge in this regard immediately after the charge. The trial judge refused to modify his charge on the grounds that it was adequate as given. We agree. The proposed charge would have been incorrect. If the testimony is false in one aspect, the jury *may* in its discretion, disregard the entire testimony, or it may give credence to other testimony supported by other witnesses or evidence. *People* v. *Johns* (1953), 336 Mich 617; *People* v. *Hunter* (1963), 370 Mich 262. It is the opinion of this Court that reversible error was not committed by the trial court in charging the jury.

The precedent in Michigan is that condemnation awards are not disturbed on appeal if within the range of competent evidence. *Department of Conservation* v. *Connor* (1947), 316 Mich 565. The decision of the lower court is affirmed, as within the range of what was presented as competent, expert testimony. No costs, a public question being involved.

T. G. KAVANAGH, P. J., and J. H. GILLIS, J., concurred.

3. STATUTE

STATE

P.A. 1911, No. 236, Eff. Aug. 1

AN ACT to authorize proceedings by the state to condemn private property for public use.

The People of the State of Michigan enact:

213.1 Condemnation of private property for state use; authority delegated; jurisdiction

Sec. 1. It shall be lawful for the governor or any other person or persons, or any board of regents, board of control or other

governing body of any state educational, penal or reformatory institution, when by law authorized to secure for the state or such institution, land as a site for any state building or buildings, state institution or public use, and for the board of regents, board of control or other governing body of any state institution desirous of obtaining the right of way over lands for the benefit of such state institution, when such persons, board of regents, board of control or other governing body, or a majority thereof shall have by resolution declared the taking thereof necessary for the public use of such state institution, to institute or cause to be instituted proceedings in the name and behalf of the state of Michigan against the land sought to be acquired, and against the owners and persons interested therein, in the circuit court of the county where the land is situated, for the purpose of acquiring by the state title to such land by judicial condemnation. And the said court in which such proceeding may be instituted, shall have and possess full jurisdiction of the subject matter of such proceedings, and power to hear, adjudge, and determine all matters touching the proceedings, and the rights and interests of all concerned.

Constitution

Art. 10, § 2, provides: "Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record."

213.2 Same; duty of attorney general; petition, contents; summons, issuance and return; incompetents; non-residents, service, notice by publication

Sec. 2. Upon request of the governor, board of regents, board of control or other governing body of any state institution, or other person or persons authorized as aforesaid, it shall be the duty of the attorney general of the state, or when directed by the attorney general, the prosecuting attorney of the county where the land is situated, on behalf of the board of regents, board of control or other governing body, if a body corporate under the law of its creation, and in behalf of the people of the state of Michigan if such governing body is not a body corporate, of any state institution, to cause a petition to be made in the name of the people of the state of Michigan and filed in the proper court, signed by the attorney general, or prosecuting attorney of the county, and by the secretary of such governing board, if a body corporate, and if not a majority of such

trustees, board of control or other governing body, or other properly authorized person, as the case may be, addressed to the court setting forth, with reasonable certainty a description of the land sought to be acquired, the names of all persons owning or having an interest therein, so far as disclosed by the records of titles of the county in which the land is situated, or can be ascertained from actual occupants; that the petition is made and presented for the purpose of acquiring the title and ownership of the land described in the petition, to and for the use of the state of Michigan, and specifying generally the purpose for which it is to be used. And the petition shall ask that all persons interested in the premises, or any part thereof, be summoned to appear and answer the petition, and show cause, if any they have, against the same. Upon filing the petition, summons shall issue in accordance with the prayer thereof, against the persons named therein, returnable on a day to be named, which shall not be less than 5 days from the issuing and test thereof, and shall be served at least 3 days before the return day, by the sheriff or other officer authorized to serve process of summons according to the rules and practice of the circuit court in other cases at law. If there are minors or persons of unsound mind interested in the premises, service may be made upon the guardian of any such person or the court may appoint a guardian ad litem for any such person, who may appear and defend for the person he represents. If there are non-resident or absent persons upon whom service cannot be obtained within the county, the court may order service upon any such person wherever he may be found, and in such manner as may be directed. The person serving any such process on such non-resident or absent person shall make proof of service by affidavit, stating the place, time, and manner of service. Or the court may order and cause notice to be given to such absent or non-resident person, by publication in such newspaper printed and published in the county as the court shall designate, and for such length of time as the court may think proper, not less than 3 weeks, once in each week; and any such service out of the county, or notice by publication, shall be as effectual for all the purposes of such proceeding and in the condemnation of the land as though the persons had been personally served within the county.

213.3 Same; petition, hearing on necessity and compensation; commissioners procedure; jury, procedure

Sec. 3. When all the parties named in the petition have been summoned or notified, in the manner provided, and the time for their appearance shall have expired, the court shall hear any and all

persons who shall have appeared and interposed objections to the petition or proceedings, and proceed to decide the questions raised, and may vacate the petition, or any part of the proceedings for cause, and may allow amendments of the petition, in form or substance, as the right of the matter shall demand. If any person having an interest in the land has been overlooked, or not summoned or notified, the court may continue the proceedings and cause such person to be served or notified. If the petition and proceedings are sustained, the court shall appoint 3 commissioners, residents and freeholders within the county, not interested or of kin to any of the persons interested in the land to ascertain and determine the necessity of the proposed public use, the necessity for using such property and the just compensation to be paid therefor by the state, which ought to be paid by the state to each of the owners and persons interested in the premises, as and for his, her or their just compensation for the land sought to be taken. Such commissioners before entering upon their duties as such shall take an oath in substantially the following form: "We do each of us solemnly swear that we will faithfully and justly determine the public necessity of the proposed use, the necessity of taking the property described in the petition filed in this cause and the amount of compensation which ought to be paid to each of the owners and persons interested in the premises described in said petition according to our best ability." They shall visit the land sought to be acquired, shall ascertain the separate interest of each person owning or interested in any part of the premises, and the description of his or her separate interest in the parcel; shall hear, in the presence and under direction of the court, evidence touching the matters they are to find, brought forward by any person having an interest, and shall find all necessary facts to possess the court with the truth and right of the matter, but shall not be required to find what evidence was offered or given, and shall report to the court, in writing, their findings. Instead of commissioners, the court, with or without the request of any person interested in any portion of the premises described in the petition, may, and upon the request of any such person shall, order a venire to issue to the sheriff, to summon 12 jurors who shall be residents and freeholders of the county where the land is situated, to attend at a time to be named, before the court, to serve as a jury. Any person interested in any part of the premises may object for cause to any of the jurors, but there shall be no peremptory challenge allowed. In case any juror fails to appear, is excused, or set aside from the panel, the court may order the sheriff, or other proper officer in attendance, to summon forthwith the requisite number of talesmen to form the jury. The jury shall be sworn, as is required of commissioners, and they shall view the

premises, hear evidence if offered, determine the necessity of the public use, the necessity for taking such property and the amount of compensation to be paid therefor and the same proceedings be had as near as may be, as hereinbefore required in reference to commissioners.

213.4 Same; objections to report filed; confirmation; deposit; vesting of title; payment of compensation; dismissal; expenses; record

Sec. 4. The court shall hear objections, if any, to the report of the commissioners or jury, as the case may be, and may set aside the report and finding, or confirm the same, and if confirmed, shall enter a judgment of confirmation, and that all right, title and interest of, in, and to the land and premises, vest in the state of Michigan: Provided, That the state, within such time as shall be therein prescribed, shall deposit in the court the amount found by the report of the commissioners or jury, as the just compensation and damages to be paid to the owners and persons interested. If, within the time so prescribed, the state shall cause to be deposited the sum so found, the court shall thereupon enter an order and judgment that the title of the state in and to said land and every part thereof is perfect, and has become absolute, and may issue the necessary writ of assistance, commanding the sheriff to deliver the possession of such land to the state; and thereupon the title and right of the state to such land shall be absolute and binding against all persons whomsoever. The persons owning and interested in said land according to the report and finding aforesaid, shall be entitled, on applying to the court, to be paid on the order of the court the amount or sum to which they are respectively entitled, according to such report or finding; for the sum received they shall respectively give to the clerk their receipt, in writing, to be by the clerk forwarded to the state treasurer. In case the state does not, within the time so prescribed, deposit in court the amount of compensation and damages awarded, the court shall order the proceedings dismissed, and the state take nothing thereby. In the proceedings authorized by this act the court shall, as to the practice and mode of proceedings, be governed by the rules applicable in cases at law, except as is in this act otherwise expressly provided. The expense of the proceedings shall be paid by the state, and a certified copy of the record of the proceedings and judgment of the court shall, together with the record thereof in the office of the register of deeds of the county, be evidence in all courts and places.

FOOTNOTE

Section 1 - Introduction

The decisions mentioned appear after this Introduction.

CHAPTER VII

THE UNIVERSITY MEDICAL CENTER AND SOVEREIGN IMMUNITY

1. INTRODUCTION

The great medical center of the University of Michigan provides academic functions of teaching and research, and also functions much like many other state institutions for the treatment of ill persons. State-sponsored programs for the treatment of various classes of patients are provided for in statutes which have been interpreted in a series of opinions of the Attorney General. Apparently no court case has been brought under these statutes.

The issue to which the courts have at length addressed themselves is the liability of the University for the malpractice of its medical staff. Of course, the classic case is that of the surgeon who leaves sponges inside his patient after an operation.

In the first case in this series, *Scott,*[1] the hospital was not involved, but rather the University of Michigan Athletic Association. The Association was sued by persons injured in the collapse of bleachers at a Michigan-Wisconsin football game of long ago. Since the Association was a voluntary group legally separate from the University itself, it did not claim sovereign immunity, and the court held that it was liable for negligence, if such could be proved.

The *Bancroft* case was settled on procedural grounds alone. The Supreme Court would permit no appeal before a final judgment in the Circuit Court below.

The *Robinson* case laid down the substantive rule that the University, as a charitable institution, was not liable for sponges left in its patients by surgeons. In *Herrst,* which involved the destruction by fire of both a University-owned barn and neighboring property, the court ruled that the University could not be held for the negligence of the neighbor boys whose careless

smoking was thought to have set the blaze.

Both the procedural and substantive rules of the early cases were disregarded in the *Christie* case. No final judgment had been entered in the Circuit Court, but an appeal was permitted from a pretrial discovery order requiring the University to produce its public liability insurance policy. Although the opinion is confused on this point, the official proceedings of the Board of Regents make it clear that the University had for some time maintained such an insurance policy which would protect injured parties unless the Regents specifically authorized the pleading of the defense of sovereign immunity.

The immunity of the University from suit was, however, not as clear as it had been at the time of the *Robinson* case because the court had already abolished the immunity from suit of all charitable institutions. Absent charitable immunity, sovereign immunity was now in question, and the different opinions expressed by the justices in this case demonstrate their confusion over which branch of government should have the authority to abolish it. Justice Black thought that because of the constitutional autonomy of the University, the legislature was unqualified for the task, and that if they had authorized the purchase of insurance, the Board of Regents had implicitly abolished immunity themselves. The dissenters still favored legislative competence in this area, but although a majority of the court did not completely agree with Justice Black's reasoning, and, technically, only affirmed the discovery order, it now seems clear that the judicial branch no longer favors the doctrine of sovereign immunity.

The effect of this apparent abolition of the doctrine of sovereign immunity was mitigated, in the transitional period, by the *Glass* and *Fox* cases which held that suits against the universities continued to be regarded as suits against the state. The result was that the Court of Claims had exclusive jurisdiction over these cases and the statute of limitations protected the universities against suits which had been wrongfully filed in the Circuit Courts.[2]

It remained, however, for the Michigan Court of Appeals to confront squarely the issue of whether the legislature could waive the sovereign immunity of the constitutionally established universities. In the case of *Branum v. Board of Regents of*

University of Michigan, that court finally disposed of the issue by upholding the statute waiving immunity and conferring exclusive jurisdiction on the Court of Claims.

The legal question of whether the University is immune to suit in the federal courts was decided in the last two cases in this chapter. In both cases the University is accorded the same Eleventh Amendment protection from suit that the State of Michigan itself would have received. In the case of *Huckins v. Board of Regents of University of Michigan* the court ruled that the University could be sued under the Jones Act for injuries to a seaman employed on a research vessel, since the Supreme Court had ruled that a state was subject to suit in similar cases. In the *MacDonald* case the Court of Appeals ruled that the University's protection from suit under the Eleventh Amendment was not waived by a technical error in pleading.

2. JUDICIAL DECISIONS

Scott v. University of Michigan Athletic Assn.

152 Mich. 684, 685-88; 116 N.W. 624 (1908)

OSTRANDER, J. Testimony was given from which the jury might have found that plaintiff was injured by the collapse of a stand, or bleacher, erected by the defendant association, for the use of and used by the public, at a game of football to which the public was invited and required to pay an admission fee for the profit of said association; that the stand, designed to support 5,000 spectators, collapsed, from inherent and discoverable weakness, when put to its intended use, when occupied by less than 3,000 persons. At the trial, both parties introduced testimony and the court, without so far as the record discloses, assigning reasons, directed a verdict for defendants. Judgment was entered on the verdict.

Plaintiff, appellant, contends that the case should have been submitted to the jury. Defendants make three contentions. They are (1) that the plaintiff has in any event no right of action against these, or any of these, defendants; (2) that plaintiff has not shown that defendants were guilty of any negligence; (3) that if the circumstances made out a prima facie case of negligent construction of the stand, the undisputed testimony for defendants established the fact of the

exercise of due care on the part of defendants to render the premises safe.

And first, as to the parties defendant. They are the voluntary association and its officers, of whom defendant Baird is one, filling the position of graduate director. The active members of the association are the undergraduates and alumni who contribute money, with an associate membership of business men. Defendant Pipp is the person employed by the association to erect, and who did erect, the stand. The theory of defendants is:

"Mr. Baird as agent of the board of regents was authorized by Regent Fletcher to put up the bleacher; he did so, had it inspected, and the board of regents had it inspected. Not only does the record fail to show any act whatever on the part of the Athletic Association in regard to the building of the bleacher, but it shows affirmatively that the Athletic Association could not have built a bleacher had it desired to do so. Ferry Field was a recreation ground for the students, and the students, of course, used the field and the structures standing upon it. As Regent Fletcher testified, the association was simply the student in another form. It appears, therefore, that while the Athletic Association had nothing to do with the erection of this bleacher, it was allowed by the regents to use the field and the bleacher for the purpose of carrying on and exhibiting the football game between Michigan and Wisconsin Universities on November 18, 1905. But the board of regents never surrendered full and absolute control of Ferry Field. While the association was using the field it was as much subject to the control of the board of regents as at other times. In other words, Ferry Field is exactly like other University property; it is owned and controlled by the board of regents for the use of the students, but such use can never be hostile to or exclusive of the continued control by the board. Having no independent right in Ferry Field the Athletic Association could sustain no independent liabilities consequent upon its use.

"It seems clear that the Athletic Association, under its permission from the board of regents to use Ferry Field pursuant to the general purposes of the University, at most merely represented the board of regents in conducting the game in question. So far as the public is concerned, the association might therefore be deemed the agent of the board of regents in conducting and exhibiting the game for the benefit of all who wished to witness it. And in that capacity the liability of the Athletic Association would appear to be the same as that of Mr. Baird himself. Each is liable, if at all, as agent of the board of regents.

"Now, it is an elementary principle of the law that an agent is not liable for mere acts of nonfeasance, but only for acts of misfeasance. This principle has been applied in a great variety of cases."

Whether the fact is or is not controlling, a point not precisely involved, we do not find in the record any testimony tending to prove that the regents, directly or indirectly, constructed or supervised the construction of the stand, or that the defendant association or Mr. Baird was an agent of the regents in that behalf. The record discloses that while Mr. Baird applied to the chairman of the committee on buildings and grounds for and received permission to build the bleacher, it and all other structures upon the grounds were paid for out of the moneys of the defendant association. The funds of the association are devoted to athletics and to the furnishing and maintaining of Ferry Field. The association receives and disburses its money and the regents exercise no control of its funds except to insist that there shall be a proper auditing of accounts. Assuming that the regents might have refused permission to erect the particular bleacher, they did not do so. They did not erect it. Assuming, further, that Mr. Baird is paid for his services as adviser of the association's athletic policy by the regents, and that his position of graduate director is dependent upon his engagement with the regents, he is nevertheless one of the directors of defendant association, and by its constitution is a member of its financial committee, and he also exercises such powers and performs such duties as its board of control may from time to time determine and require. Whether the related facts affect alike all of the defendants, whether for any reason the judgment should be affirmed as to some of the defendants, are subjects not referred to in argument and questions not considered.

The remaining contentions may be considered together. The testimony goes much beyond proving merely an accident and resulting injury. That relied upon to show that defendants exercised due care tends to prove that the stand was erected by a competent and experienced builder, of good materials; that before it was used it was inspected by engineers and others admittedly competent to perform the work of inspection, who pronounced it safe. It is clear, however, that a wholly inadequate structure was in fact tendered for public use, and it cannot be determined, upon this record, as matter of law, that a latent and not a patent defect, discoverable in the exercise of proper care, existed. The managers of the grounds and stands occupied upon the occasion in question the position of proprietors of a public resort. Plaintiff was not a mere licensee and did not occupy the stand by mere invitation. Whether responsibility to

the plaintiff is grounded, in the form of action instituted, upon a contract or upon a duty, it exists, if at all, because of an implied contract. The implied contract was that the stand was reasonably fit and proper for the use to which it was put; the duty was to see to it that it was in a fit and proper condition for such use. Neither plaintiff nor the public generally would be expected to examine the stand and judge of its safety. This consideration, and the probable consequences of failure of the structure, imposed upon the responsible and profiting persons the duty of exercising a high degree of care to prevent disaster. They were not insurers of safety, they did not contract that there were no unknown defects, not discoverable by the use of reasonable means; but, having constructed the stand, they did contract that, except for such defects, it was safe. 1 Thompson on Negligence, §§ 994-997; 21 Am. & Eng. Enc. Law (2d Ed.), p. 472; *Francis* v. *Cockrell,* L. R. 5 Q. B. 184, 39 L. J. Rep. (N. S.) Q. B. 113, 291. See, also, *Fox* v. *Buffalo Park,* 21 App. Div. (N. Y.) 321, 163 N. Y. 559.

The judgment is reversed, and a new trial granted.

GRANT, C. J., and BLAIR, MONTGOMERY, and CARPENTER, JJ., concurred.

Bancroft v. Board of Regents of University of Michigan

192 Mich. 168, 169; 158 N.W. 337 (1916)

PER CURIAM. Plaintiff filed her suit to recover damages for personal injuries which she claims to have incurred and which she avers were occasioned by the negligence of defendants. The defendants demurred to the declaration, and after argument the same was sustained. This was followed by the issuance of a writ of error from this court without any final judgment having been entered in the trial court, and, so far as the record shows, we are not advised that a final judgment has since been entered therein. Under this state of facts the practice will not permit of a review of the case in this court. *Green* v. *Eaton Probate Judge,* 40 Mich. 244; *Delaney* v. *Lumber Co.,* 144 Mich. 351 (108 N. W. 77); *Barribeau* v. *City of Detroit,* 146 Mich. 392 (109 N. W. 665); *In re Vetter's Estate,* 162 Mich. 109 (127 N. W. 306).

The writ will be dismissed, with costs to appellee.

Robinson v. Washtenaw Circuit Judge

228 Mich. 225, 225-30; 199 N.W. 618 (1924)

STEERE, J. Plaintiffs in the above entitled cases are husband and wife. Each commenced a tort action in the circuit court of Washtenaw county against Dr. Scott C. Runnells and the regents of the University of Michigan to recover damages resulting from injuries alleged to have been wrongfully inflicted upon her (Fay Robinson) while a surgical patient in the University hospital. The questions involved in these mandamus proceedings are substantially the same in both cases and they were submitted upon the same briefs. Service was duly had upon defendants and similar declarations, each containing two courts of like import, were filed and served. Counsel for defendant appeared specially in said cases and entered motions requesting the court for orders dismissing the declarations "or in the alternative, in case such relief cannot be granted, to dismiss the second count in said declarations against said regents of the University of Michigan," stating various grounds therefor. The court denied said motions as to Dr. Runnells and granted them as to the regents. Plaintiffs ask mandamus to compel defendant herein to set aside his orders dismissing the declarations against the regents.

The first count in the declarations alleges that Mrs. Fay Robinson being ill consulted Dr. Runnells, a physician and agent of the regents of the University, who advised her that an abdominal operation was necessary, to which she consented and was operated upon at the University hospital by him; and charges that in performing the operation he negligently permitted a sponge which he had placed in her abdomen to remain after the wound caused during the operation had been closed, in consequence of which she suffered greatly and became yet more dangerously ill, rendering another operation necessary in order to save her life, which disclosed the presence of the sponge left there during the former operation. The second count in the declarations more distinctly charges such neglect and lack of skill, with the serious results which followed, to the regents of the University of Michigan, their physicians, nurses, agents, servants, etc.

Plaintiffs' counsel in his brief points out that the actions are not brought "against the hospital of the University of Michigan, but against the regents of the University of Michigan," and urges that the question is disposed of by the provision of section 1159, 1 Comp. Laws 1915, providing that "The board of regents shall constitute a body corporate, with right as such of suing and being sued," contending that the regents are in no sense an eleemosynary institution

entitled to be excepted from the general rule that a corporation is liable for the torts of its agents; while counsel for the regents urge that no cause of action is stated against them because the University hospital, maintained under the direction of the regents in connection with its medical department, is a charitable institution, eleemosynary in character. Other objections are raised but this is the only one which we regard as calling for serious consideration.

The regents of the Michigan University are constitutional State officers, their selection and election being on the same basis as that of the judges of the Supreme and circuit courts, the State superintendent of public instruction and other specified State officers who are elected at the biennial spring election, all of whose names are required by law to be placed upon an official State ballot in a designated order, those of the regents being second on the list.

Our Constitution recognizes "Education" as a subject of governmental concern and activity. Its article 11 is so entitled and devoted to that subject, three sections of which relate exclusively to regents of the University, who are to be eight in number, hold office for eight years, two to be elected at each regular biennial spring election. They are to constitute a "body corporate known as 'The Regents of the University of Michgian.' " They are given, as a board, "general supervision of the University and the direction and control of all expenditures from the University funds." Section 10 of the article contains the mandate that "The legislature shall maintain the University" and other named State educational institutions, "and also such normal schools and other educational institutions as may be established by law." With such provisions in our Constitution it seems clear that the general supervision of the University, and direction and control of all expenditures from its funds is a governmental activity, and the board of regents a State agency to carry out the will of the people, as expressed in the Constitution they adopted, in regard to the educational institution committed to its care and supervision.

Prior to adoption of the old Constitution of 1850 the University was supervised and its affairs administered by a board of trustees as a body corporate to whom the regents succeeded under substantially the same provision as in our present Constitution of 1909. Its corporate character was, and is, clearly that of a public corporation, created for public purposes only, for no private emolument or advantage, and therefore an agency of the State government. It is required by law in broad terms to provide the inhabitants of the State the means of "acquiring a thorough knowledge of the various branches of literature, science and the arts." To that end it is required

to establish and maintain numerous departments of schools devoted especially to instruction in various callings and professions, including a medical department in connection with which its hospital is maintained for the benefit of the public at public expense. Special laws of charitable import have been passed from time to time such as providing admission to the hospital and free treatment of indigent persons and others, admission of indigent children afflicted with curable deformity or chronic diseases with both medical and surgical treatment, board, lodging and nursing free of charge, for maintenance of said hospital in operation during the summer vacations of the University, etc., all of which, furnished and maintained by the State, gives that adjunct of the medical department of the University the character of a public charitable hospital. The money raised by the State to maintain it, as well as the other activities of the University, is a trust fund of which the board of regents is trustee. As was said in *Downes* v. *Harper Hospital,* 101 Mich. 555 (25 L. R. A. 602, 45 Am. St. Rep. 427):

"If, in the proper execution of the trust, a trustee or an employee commits an act of negligence, he may be held responsible for his negligent act; but the law jealously guards the charitable trust fund, and does not permit it to be frittered away by the negligent acts of those employed in its execution. The trustees of this fund could not by their own direct act divert it from the purpose for which it was given, or for which the act of the legislature authorized the title to be vested in the defendant. It certainly follows that the fund cannot be indirectly diverted by the tortious or negligent acts of the managers of the fund, or their employees, though such acts result in damage to an innocent beneficiary. Those voluntarily accepting the benefit of the charity accept it upon this condition.

"The fact that patients who are able to pay are required to do so does not deprive the defendant of its eleemosynary character, nor permit a recovery for damages on account of the existence of contract relations. The amounts thus received are not for private gain, but contribute to the more effectual accomplishment of the purpose for which the charity was founded."

So far as we discover, the authorities are practically all to the effect that charitable or eleemosynary institutions supported wholly or in part by a State or municipality are not liable for personal injuries suffered through the negligence of an employee, servant or agent of the institution. Plaintiffs' counsel cites no authority to the contrary, and apparently contends that decisions to that effect are

not in point because the actions are against the regents made by statute capable of suing and being sued. The fact that the regents as a public body corporate have the right of suing and being sued in a proper case, involving property rights or based on contract relations, is immaterial here. The question before us is whether these declarations sounding in tort based on personal injuries state a cause of action against the board of regents.

The hospital is an adjunct of the medical department of the University, which is a State educational instrumentality maintained by the public at public expense, controlled and operated by the board of regents, a governmental agency which receives in trust and expends the public money devoted to that purpose. In the exhaustively discussed case of *Bruce* v. *Central M. E. Church,* 147 Mich. 230, 238 (10 L. R. A. [N. S.] 74, 11 Ann. Cas. 150), it is said by Justice OSTRANDER in his dissenting opinion:

"An examination of cases, including most of those cited in the opinion in the *Downes Case,* shows that in many instances the institutions were in fact State instrumentalities, as well as charities, and the denial of liability might have been rested in such cases wholly, as it was in some of them in part, upon that ground."

On the case stated in plaintiffs' declarations we think denial of liability as to the regents could safely be rested on either ground.

The writs of mandamus applied for are therefore denied.

CLARK, C. J., and McDONALD, BIRD, SHARPE, MOORE, FELLOWS, and WIEST, JJ., concurred.

Herrst v. Regents of the University of Michigan

231 Mich. 369; 204 N.W. 119 (1925)

WIEST, J. Plaintiffs own a lot on Belser street in the city of Ann Arbor. The regents of the University own a lot on Volland street in the same city. Plaintiffs' lot and the University lot abut at the rear. Defendant Edward C. Pardon, in July, 1923, was superintendent of buildings and grounds held by the regents and, as such, had permitted Earl Rising, tenant of the Volland street lot, to build a barn on the lot, so close to the line and near a barn standing on plaintiffs' lot that, when the Rising barn burned, July 26, 1923, it

set fire to plaintiffs' barn and destroyed it and its contents. This suit was brought to recover the loss suffered by plaintiffs, and verdict was had against both defendants, but judgment against defendant Pardon alone. The regents were discharged from liability under the authority of *Robinson* v. *Washtenaw Circuit Judge,* 228 Mich. 225. Defendant Pardon reviews by writ of error. Plaintiffs claim it was the duty of Mr. Pardon to supervise the use made by the tenant of the property rented from the regents and prevent the tenant from endangering plaintiffs' property. It is claimed the tenant of the regents built his barn within about three feet of the rear lot line and within about four feet of plaintiffs' barn, fastened some pieces of 2x4 to plaintiffs' barn in violation of the housing code of the State, piled combustible material between the barns and permitted children to frequent the barn. The day of the fire a 12-year-old boy, it is claimed, came out of the barn with a cigarette and soon thereafter the Rising barn was discovered on fire, and the fire spread to and destroyed plaintiffs' barn. What negligence of defendant Pardon was the proximate cause of this fire? Assuming, but not deciding, that the liability of Mr. Pardon is the same as that of an owner, did the duty rest upon him to so supervise the use of the barn by the tenant as to prevent children from being permitted therein or to prevent some trespassing boy from visiting the premises and smoking therein? We think not.

A landlord is not liable for the use of premises by a tenant in such a way as to occasion damage to a neighboring proprietor, merely because there was a possibility of their being so used. The wrong in such a case is that of the tenant and the liability therefor will stop with the tenant. The erection of the barn was lawful and its use legitimate. Any abuse of rights of neighboring proprietors in the use of the barn by the tenant was not chargeable to the landlord unless such abuse was sanctioned by the landlord; and such sanction could not rest upon implied notice and acquiescence. If the fastening of the 2x4 to plaintiffs' barn was wrongful, still there is nothing in the case to show defendant directed, sanctioned, or even knew that it had been done, and besides, it cannot be said to have had even a causal connection with the fire. The same may be said of the claimed combustible material piled between the barns, for the fire did not originate in such material, neither was such material the cause of carrying the fire to plaintiffs' barn. Up to the very hour of the fire there had been nothing done by the tenant which would have justified the landlord in ending his tenancy. If in law the landlord could not have interfered with the use made by the tenant of the premises, surely liability for such use does not fasten to the landlord. There is no evidence in the case of a violation of the State housing code.

Section 18, Act No. 326, Pub. Acts 1919 (Comp. Laws Supp. 1922, § 5180 [19]), upon which plaintiffs rely, has no bearing. This section regulates the space *between buildings on the same lot with a dwelling;* permits a stable at the rear of a lot but requires a passage at least three feet wide from the yard to an alley. The barn built by the tenant was wholly upon the land of the regents and there was no negligence on the part of the regents or of their agent in permitting it to be built close to the line. Plaintiffs claim the fire was set in the Rising barn by the 12-year-old boy lighting a cigarette therein. This boy, so far as the record shows, was a trespasser. The tenant had no children. But it is said the tenant had ponies in the barn and this called children and it was the duty of defendant Pardon to notice such fact. The evidence fails to show smoking by children about the barn previous to the date of the fire. It was not the duty of Mr. Pardon to pay attention to the fact that the tenant had ponies in the barn and this called children, nor should he have anticipated that some boy might visit the barn and smoke therein.

The circuit judge instructed the jury that:

"Something was said to you about the construction of the barn contrary to the housing code. Unless you find that was the proximate cause of the injury complained of, of course you could not find for the plaintiffs in this cause."

We have searched this record to discover what violation, if any, with reference to the provisions of the housing code, was before the jury, and find none. If there was no violation of the housing code permitted or acquiesced in by Mr. Pardon, then he is not liable in this case. The building of the barn did not violate the housing code. The two barns being less than four feet apart rendered it inevitable that the burning of one would spread to the other and the combustible material, if any, lying between the two barns, cannot be said to have caused the fire to spread from one barn to the other. The proximate cause of the fire was under plaintiffs' evidence the careless act of an intruding boy.

Rowland v. *Kalamazoo Sup'ts of Poor,* 49 Mich. 553, relied on by plaintiffs, involved liability arising from negligently permitting set fires to spread, to the injury of a neighboring proprietor, and lays down no rule aiding plaintiffs in this case. We find no negligence chargeable to defendant Pardon rendering him liable in this case. The proximate cause of the fire was not his failure to perform any duty or in permitting the tenant to perpetrate a wrong. The court should, notwithstanding the verdict, have entered judgment in favor of Mr. Pardon.

The judgment is reversed and the case remanded with direction to enter such judgment. Defendant Pardon will recover costs.

McDONALD, C. J., and CLARK, BIRD, SHARPE, MOORE, STEERE, and FELLOWS, JJ., concurred.

Christie v. Board of Regents of The University of Michigan

The Supreme Court of Michigan, 1961
364 Mich. 202, 203-07, 209-19, 228-31; 111 N.W. 2d 30 (1961)

BLACK, J. Comes the intruder spoilsport as the legislative and judicial branches continue their gambol o'er the field of sovereign immunity. Here the recurrent problem—what to do with another aspect of such immunity—cannot be buck-lateraled to the legislature. By the Constitution that august body has been rendered ineligible to receive, in today's game, any kind of a pass from the judicial branch.

Plaintiff, at 7 years of age, sues for personal injury said to have been negligently inflicted while he was a patient—during early infancy—in the university hospital. The asserted negligence consists of permitting him to fall "from an unattended crib from which all restraints had been removed."

Suit was commenced by summons. With commencement of suit plaintiff filed a petition for discovery, asking among other things that the defendant board of regents be compelled "to produce its policy of liability insurance for the inspection and examination by the plaintiff." The circuit judge entered an order for production and inspection of the policy, doing so on theory that the policy should be ordered in as possibly admissible evidence tending to establish that the defendant board had waived its immunity from liability, to the plaintiff, to the extent of the insurer's monetary obligation.

On application of defendant and grant of leave we review such order for production and inspection. Plaintiff's statement of the reviewable question is comprehensive and fully explanatory:

"In civil action against board of regents of university of Michigan for personal injuries suffered by infant patient of university hospital through negligence of defendants' servants, agents and employees, did circuit judge abuse his discretion on plaintiff's amended petition for discovery filed prior to declaration when he ordered defendants to produce for plaintiff's examination the contract of

insurance existing between them and their liability insurance carrier when the cause of action arose?"

I would affirm on ground that the questioned order is well within the discretionary authority Court Rule No 40 (1945) provides. The relevantly sole requirement of that rule is that there be fair showing that the petitioning plaintiff needs such production and inspection in order to declare properly the cause his petition supposedly portrays.

Does this plaintiff need the policy in order to declare? From the face of his untraversed petition I conclude he does. *McNair* v. *State Highway Department,* 305 Mich 181, has made it abundantly clear that when an apparently immune public body is sued on allegation of tort liability the plaintiff must allege facts which, if true, overcome the standard posture of such body that "no court can hold us liable." In a word, a part of this plaintiff's burden is that of duty to plead and prove some status which legally impairs or destroys the defendant board's seeming exemption. No waiver *by neglect to raise the question* can exist *(McNair, supra),* and so it is necessary to explore the ultimate and decisive question: Whether the resolution of the defendant board to acquire and maintain such liability insurance operates as a matter of law to waive its immunity to the extent of the insurer's obligation.

I agree with the statement of the annotator of a recent and exhaustive appraisal of this question who says (annotation headed "Liability or indemnity insurance carried by governmental unit as affecting immunity from tort liability"; 68 ALR2d 1437, 1448):

"In a few jurisdictions the courts have taken the view (which is worthy of characterization as enlightened) that to the extent that a liability insurance policy protects a governmental unit against tort liability, the otherwise-existing immunity of the unit is removed."

In this case there are 2 good reasons for concurrence with the annotator's conclusion that such is the "enlightened" view. The first is that the fact of such insurance has eliminated the classically suave reason for immunity of the defendant board from liability (if proven) to this plaintiff.* The other and specially distinctive reason is that

*See, for recent exposition and repudiation of the doctrine that immunity is required to protect public revenues from dissipation on account of torts of public servants, *Molitor* v. *Kaneland Community Unit District No. 302,* 18 Ill2d 11 (163 NE2d 89), and *Muskopf* v. *Corning Hospital District,* 55 Cal2d 211 (11 Cal Rptr 89, 359 P2d 457).

the defendant board is so far autonomous and constitutionally independent as to clothe it with plenary as well as exclusive power of waiver of such immunity and that it has already exercised such power so far as concerns this case.

The first point—that the board's determination to acquire and carry liability insurance removes the historic reason for immunity—requires no extended analysis. We are yet free to pick and choose among authorities extant. My choice, if it were presently necessary to choose, would be with the "enlightened"—and visibly growing—minority. As the cited annotation shows, the more numerous authorities adhere to position that public bodies, having spent public money for liability protection thereby incur no liability; a game which in fact if not by design unjustly enriches the insurer for carrying a risk where there is no risk.* Other authorities, "enlightened" I repeat, pursue the opposite and more explicable view.

Whatever view one may take of this diversity, the majority rule becomes irrelevant when it is shown that the critical bastion thereof (that the legislature only may waive) is nonexistent. Such is the case here. If the defendant board is by the Constitution given the exclusive power to waive, then it would surely seem that the reasoning of such minority is best for the specific case at bar.

The board of regents is a separate and self-governing body corporate, made so by the Constitution (Const 1908, art 11, § 4). By our decisions it is "a constitutional corporation of independent authority, which, within the scope of its functions, is co-ordinate with and equal to that of the legislature." It has "independent control of the affairs of the university by authority of these constitutional provisions" (quotations from *Board of Regents of the University of Michigan* v. *Auditor General,* 167 Mich 444, 450), and so its counsel are right when they insist in their brief that the legislature (as in the case of the State proper and its statutory agencies) cannot waive the immunity of the board without consent of the board.**

*The majority rule, and the reasoning submitted in support of it, was comprehensively summarized in the recent case of *Maffei* v. *Incorporated Town of Kemmerer,* 80 Wyo 33 (338 P2d 808, 817):

"There are many decisions from other jurisdictions which hold there can be no waiver of a municipality's immunity unless by specific legislative authority, and they are persuasive. [Citing cases.] We, therefore, hold it is beyond the power of a municipality to waive an immunity which it possesses by virtue of its being an arm of the State's government and that any waiver of such an immunity must come by direct action of the legislature or through the clear and unmistakable implication of its legislative acts."

**Counsel for the board do not stop with assertion that the legislature cannot waive the board's immunity. They take a 7-league step farther by this

But this is a knife with 2 edges. If the board by the Constitution stands separate from and declaredly equal to the legislature, then it alone has a right to waive and, by the same token, a right to reject any legislative act of waiver in its behalf. By the past and tried reasoning of this Court the board is, "within the scope of its functions," its own legislator and may legislate that which I find implicit in its decision to carry the insurance that this plaintiff would unearth for the purpose of pleading.

Consider these interpretations we have made of the eleventh article and its predecessor:

* * *

Summary: The board of regents has exclusive power to waive the immunity our decisions have bestowed on it.* Such may be done by implication from action of the board as well as by express resolution thereof. Here the board has solemnly resolved to carry and pay for, out of funds of the university committed to its discretion, such insurance against liability as is quite inconsistent with an immunity from such liability. Originally there was no liability. Now, by voluntary and lawful action of the board, there is liability and insurance against loss occasioned by such liability. If this is not true, then we must instead attribute to an unusually exalted group of constitutional officers the intent solely of awarding some politically influential insurance agency a fat and steady premium account for insuring the board and the university against risks which do not exist. That I am unwilling to do. The board does not sit and govern in the midst of partisan pressures and it should be accorded the presumption that each determination of its members to spend university funds imports a consideration; something for something which is valuable to the university.

It requires no Churchillian-worded resolution of the board of regents—adorned say with red ribbon and blue seal—to waive a status which at best stands precariously at bay before the developing impact of judicial authority (see discussion and exhaustive examination of authorities in *Parker* v. *Port Huron Hospital,* 361 Mich 1, and the

(Footnote Continued)

bold *ipse dixit:* The people only, by constitutional amendment, may waive in behalf of the board. With the latter I cannot agree. By force of the broad construction this Court has placed on article 11 the board may lawfully waive its own immunity from tort liability.

**Robinson* v. *Washtenaw Circuit Judge,* 228 Mich 225, is not opposed to these conclusions. The effect of acquisition of liability or indemnity insurance was not considered on that occasion and we may assume from the Court's opinion that the board did not carry such protection at the time.

most recent case in point, *Muskopf, supra*). In the law as elsewhere actions sometimes speak louder than words. Here, by force of contemplative action of the board, we must either by our decision tacitly approve dissipation of university funds to no useful end or draw from that action whatever liability the judicial process may decide is a reasonable incident thereof. I prefer the latter and accordingly agree with the reasoning of Chief Justice DETHMERS, recorded in *Peters* v. *Michigan State College,* 320 Mich 243, 251.

Plaintiff's undenied petition for discovery discloses good reason for exercise of the discretion Court Rule No 40 (1945) confers. The defendant board should be required to bare its policy—insurance policy, that is. Further, and if the inspected policy fairly suggests additional inquiry, the minutes or other evidences of corporate action by which the insurance was acquired should be discovered under the rule.

I vote to affirm, without an award of costs.

SUPPLEMENT (September 1, 1961).

This case of Christie was duly assigned to the writer prior to commencement of our April term. In pursuance of such assignment the foregoing opinion was prepared and delivered to other members of the Court under date of June 6, 1961. Since then Mr. Justice CARR, writing under date of August 30, 1961, for reversal, has called attention to an affidavit, "executed by 1 of the attorneys for defendant, indicating that a search of the files and records of the university had not disclosed any copy of such a policy, and such had not been otherwise discovered or made known to defendant."

The affidavit to which my Brother refers was prepared (and included in defendant's appendix) long after Judge Breakey's presently reviewed order for discovery was entered, and long after we had granted (July 11, 1960) defendant's application for leave to appeal. No one claims that it or the thrust thereof—that no policy can be produced—was ever brought to the trial judge's attention, and no motion designed to include same in the record on appeal (see Court Rule No. 72, § 1[d], [e] [1945]) has been made at any time.

In order that the exact content of this "unable to find" affidavit may be read by the profession with verbated accuracy, same is quoted in full as follows:

"1. That on December 18, 1959, the circuit court ordered the production of the defendant's liability insurance policy which was in force in September of 1953, for the purpose of permitting the plaintiff to inspect the same.

"2. That from said order application for leave to appeal to the Supreme Court was taken and said application was granted on July 11, 1960.

"3. That at the time the matter was being considered by the circuit court and during all of the time that appeal proceedings were pending the defendant did not know that the said policy was not capable of being produced.

"4. That upon request of your deponent, a search was made of the files and records of the University of Michigan for the policy, which could not be found, and on information and belief a search was made of the files and records of the defendant's insurance carrier, both in the Detroit office and in the New York office, and no copy of such policy was discovered. That as of this date, a continuing search of the company's New York office is being made.

"5. That this fact was not known conclusively by the defendant or by this deponent until on or about October 28, 1960."

It will be noted that the affiant carefully refrains from saying that no policy was ever existent or in effect, and the fact that an instrument once at hand has since been lost provides no way for evasion of discovery. In such case the law employs its tried rules of best and secondary evidence.

I do not care to encourage the growing practice of bolstering circuit court records by post-appeal *ex parte* affidavits of fact (see *Chircop* v. *City of Pontiac,* 363 Mich 693). Such affidavits usually—as here—set forth facts which have never been brought to the attention of the trial judge or chancellor. It is suggested instead that we have no right to consider instruments of that nature unless and until they have been made a part of the record pursuant to said Court Rule No 72 (1945).

If in this case it is shown—ultimately—that the defendant at no time acquired a policy such as Judge Breakey ordered produced, the judge will surely modify his order. Until such showing is made we should proceed to review upon the circuit court record as it stood when the order of discovery was made and our order granting leave to review that order was entered.

My vote to affirm, without costs, is cast again.

EDWARDS, J. *(concurring).* We concur in affirmance on the grounds stated in sentences 4 through 14 of the opinion of Mr. Justice BLACK.

KAVANAGH and SOURIS, JJ., concurred with EDWARDS, J.

CARR, J. *(dissenting).* The determination of the issue here is of vital concern not only to the university of Michigan but also to the State, governmental institutions and agencies of the State, municipalities, governmental subdivisions, and school districts. It requires our most serious consideration. Shall basic principles of law and public policy, uniformly recognized and upheld in this State up to this time, be now abandoned?

The case now before us was instituted by issuance of a summons from the circuit court of Washtenaw county, requiring defendant's appearance within 15 days after service thereof. The writ specified that plaintiff claimed damages in an amount not exceeding $375,000. On the same date that the summons was issued counsel for plaintiff filed a petition, or motion, for an order of discovery. It was set forth therein that on or about September 13, 1953, plaintiff was a patient in the university of Michigan hospital, and that as a result of negligence on the part of hospital attendants he was allowed to fall in such manner as to cause serious physical injuries. Disclosure of certain facts and of exhibits presumably desired for admission on the trial was asked, including "the insurance contract of defendants and their liability carrier."

Apparently all information sought by the petition was furnished to plaintiff's counsel pursuant to agreement with attorneys representing defendant, with the exception of the liability insurance policy. By subsequent amendment to the petition it was asserted on behalf of plaintiff that access to said policy, if in existence, was necessary to enable his counsel to properly allege the cause of action relied on in the declaration to be filed. The language of the petition for discovery indicated that counsel representing plaintiff were proceeding on the theory that, if liability coverage was afforded by a policy of the character in question at the time of the injury to plaintiff, public funds, at least to the extent of such coverage, would not be jeopardized, that the taking out of the policy eliminated *pro tanto* the right of governmental immunity, and that a cause of action was in consequence created as against defendant (or the insurance carrier) to the extent of the liability coverage specified in such policy, assuming that there was such.

Following a hearing on the discovery petition the circuit judge before whom the matter was heard entered an order directing that:

"The defendants produce for plaintiff's examination the contract of insurance which was existing between defendants and their liability insurance carrier on the 13th day of September, 1953. Said contract may be photographed by plaintiff."

It will be noted that the order above quoted, from which defendant on leave granted has appealed, assumes the existence of a policy of the general nature suggested by the petition for discovery. Said petition did not aver the actual fact in this regard, the request for the order sought, and granted, apparently resting on the theory that a general liability insurance policy covering defendant and its agents, representatives and employees, might be in existence, and that if so it should be produced to the end that the cause of action might be averred accordingly. In appellant's appendix we find an affidavit, executed by 1 of the attorneys for defendant, indicating that a search of the files and records of the university had not disclosed any copy of such a policy, and such had not been otherwise discovered or made known to defendant. Whether there was a sufficient basis afforded by the petition for discovery to entitle plaintiff to the order sought may well be questioned, but in view of the importance of the basic question at issue it will be assumed herein that compliance with the order of the circuit court is possible.

Counsel for plaintiff contend in substance that if defendant procured to be issued to it a policy of insurance covering liability for negligence of its agents and employees generally it thereby waived the right to assert governmental immunity as a defense. The argument concedes the existence of the immunity doctrine and that it is applicable to defendant. This, of course, is in accord with prior decisions of this Court. Counsel apparently base their argument on the theory that such immunity is a matter of defense, but such is not the fact. If immunity exists there is no cause of action. In consequence, we are not here concerned with the problem of waiver of a defense to an action for damages. Rather, the question before us is whether the taking out of a liability insurance policy, if such there was, abrogated, at least *pro tanto,* the immunity that otherwise would exist.

Necessarily involved in the problem before us are 2 questions: First, did the board of regents have the power to abrogate as to itself the doctrine of governmental immunity, either wholly or in part?; Second, would the taking out of an insurance policy against liability for negligent acts of employees and others have the effect of abolishing such governmental immunity, either partly or wholly? Both of these questions must be given a negative answer. Emphasis is placed on the fact that under the Constitution of the State (article 11, § 5) the board of regents is charged with "the general supervision of the university and the direction and control of all expenditures from the university funds." Section 10 of the same article requires that the legislature "shall maintain the university" and other designated educational institutions. The supervision of the university and the expenditure of its funds do not involve the exercise of legislative

authority. Nowhere in the Constitution of the State do we find granted to the defendant board authority of such character. The making of appropriations for the support of the institution was expressly committed to the legislature, such action obviously falling within the scope of legislative powers.

Article 5, § 1, of the Constitution declares that "The legislative power of the State of Michigan is vested in a senate and house of representatives", such vesting being subject to the powers reserved to the people under the initiative and referendum provisions in said section. In *Harsha* v. *City of Detroit,* 261 Mich 586, 590 (90 ALR 853), it was stated that:

"The legislative power is the authority to make, alter, amend, and repeal laws. 1 Cooley, Constitutional Limitations (8th ed), p 183."

The doctrine of immunity in connection with the performance of governmental functions has been accepted in Michigan, and in the other States of the Union as well, as a part of the common law. The 3 Constitutions adopted in the past expressly recognized the continuing force of the common law, the Constitution of 1850 declaring in section 1 of the schedule thereof that:

"The common law and the statute laws now in force, not repugnant to this Constitution, shall remain in force until they expire by their own limitations or are altered or repealed by the legislature."

In the Constitution of 1908 the last 3 words quoted were omitted, the record of the proceedings of the Constitutional Convention indicating that such omission resulted from the plan for local self-government for cities and villages, adopted by the convention, such plan contemplating the preparation and acceptance of home-rule charters to take the place of existing legislative charters. Obviously it was deemed expedient to eliminate any question as to the necessity of having a legislative repeal of existing special charters. The omission of the words in question did not alter the fact that all legislative power was vested, under the specific provisions of the Constitution, in the legislative department of government. Such power extended to and included specifically the repeal or modification of the common law recognized by the Constitutions, including the present fundamental law of the State. The conclusion necessarily follows that the board of regents of the university of Michigan was not vested with legislative authority to abrogate as to itself the existing doctrine of governmental immunity.

It was declared by this Court in *Lucking* v. *People,* 320 Mich 495, 503, that:

"The lands, buildings and equipment under the management, supervision and control of the board of regents of the university are public property, owned by the State of Michigan."

As before noted, the Constitution of the State commits to the defendant board the duty and responsibility of exercising supervisory control over the university and also responsibility for the expenditure of its funds. The duty thus created exists and must be exercised for and on behalf of the people of the State. No one will seriously contend that the authority so granted would permit gifts of property or money, belonging to defendant board, required to be used for the purpose above indicated. By the same process of reasoning defendant in the exercise of the supervisory and administrative functions vested in it by the Constitution may not surrender or abrogate valuable rights recognized by the fundamental law of the State, and created and existing for the benefit and protection of defendant in the performance of its governmental duties. Had defendant by express resolution undertaken to abolish or modify the doctrine of governmental immunity as to it, such action would have been ineffective. Nor could such result follow from a contract executed in connection with the carrying on of functions of the board.

A State agency or municipal governmental authority may not bind itself by a contract into which it is not authorized to enter. As above pointed out the Constitution of Michigan, by which defendant board is bound, contains no grant of power to invade the legislative field nor to enter into contractual undertakings other than in furtherance of the authority granted and in the exercise of the purposes thereof.

[Out of state cases are discussed.]

By analogy the above cited cases sustaining the majority rule are in accord with the holding of this Court in *DeGroot* v. *The Edison Institute,* 306 Mich 339. In that case the plaintiff brought an action for damages claimed to have resulted from negligence on the part of the defendant. The proofs indicated that the Institute was a nonprofit and public benevolent institution. The trial court granted defendant's motion for judgment notwithstanding the verdict of the jury in plaintiff's favor, and this Court approved under the rule that eleemosynary institutions are exempt in Michigan from liability based on the grounds asserted in plaintiff's declaration. It was stated that (pp 343, 344):

"Nor does the fact that the nonprofit corporation carries liability insurance so change its status as to make the corporation liable for an injury for which it would not otherwise be liable."

Other decisions in States adhering to the majority rule are in accord with the above cases, the opinions in which indicate the weight of authority and the reasons on which the prevailing rule rests. The New Hampshire decision, *supra,* fairly epitomizes the proposition at issue with its statement indicating that the purpose of a policy of insurance is to indemnify the insured rather than to create liability. As hereinbefore noted, however, the acceptance of plaintiff's claim as to the effect that may be given to the existence of a general policy of indemnity insurance rests on the theory that by such a contract the abrogation or modification of the doctrine of governmental immunity has resulted.

In the instant case it is clear that under the provisions of our Constitution the board of regents of the university of Michigan is not invested with legislative powers. Its powers and duties have reference to the administration of the affairs, educational and financial, of the university. Whether the rule of governmental immunity should be modified or abrogated is a legislative matter, and in the final analysis the authority must be exercised in accordance with Constitutional provisions relating to the legislative department of government. Obviously the people, by Constitutional amendment, have full authority to act. Whether the State legislature may by general law abrogate or modify the existing rule of governmental immunity as to defendant board of regents is not involved in the instant case. No such law has been enacted. So far as the instant case is concerned, defendant board of regents has not by express resolution undertaken to abolish or alter such rule of immunity which it has possessed from the time of its creation. For the reasons above pointed out it is without power to take such action, and what it may not do expressly may not be accomplished impliedly through or by means of a contract of indemnity insurance.

The conclusion follows that the examination of the policy to which the order of the circuit court had reference would not enable counsel for plaintiff to allege in their declaration a cause of action against defendant board of regents. Such policy would not be entitled to admission in evidence in the trial of the case and, in consequence, it must be said that Michigan Court Rule No 35, § 6 (1945),* on which plaintiff's petition for discovery was based did not authorize the order from which the appeal has been taken.

*As added June 27, 1952 and amended June 11, 1958. See 334 Mich xl and 352 Mich xvii.—REPORTER.

Counsel for appellant calls attention to the decision of this Court in *Robinson* v. *Washtenaw Circuit Judge,* 228 Mich 225, in which it was held that the hospital of the university of Michigan was a charitable or eleemosynary institution, because supported at public expense, and that the regents of the university were not liable for damages for injuries, alleged to have been suffered by plaintiff while a surgical patient in the hospital, because of the status thereof, as well as on the ground that as an agency of State government the general rule of immunity was applicable. Attention is directed to the fact that the injuries sustained by plaintiff in the instant case were suffered in 1953. In the prevailing opinion in the case of *Parker* v. *Port Huron Hospital,* 361 Mich 1, it was held that the change in the rule as to the liability of charitable nonprofit hospital organizations should apply in that case and (p 28) "to all future causes of action arising after September 15, 1960." It is suggested in substance that the decision in *Parker* may not be applied to the instant case in view of the limitation as to the effective time of the holding. Also involved is the question whether such holding is applicable to the hospital of the university of Michigan which under the provisions of the State Constitution is subject to supervision and control by the defendant board of regents. However, we think that the instant case should be determined on the basis that the doctrine of governmental immunity is applicable to the defendant.

The case should be remanded with directions to set aside the order from which defendant has appealed.

KELLY, J., concurred with CARR, J.

DETHMERS, C. J., and TALBOT SMITH, J., did not sit.

The *Christie* case was decided September 22, 1961. The Board of Regents held its September meeting one week later. The official Proceedings of the Board of Regents for that meeting contains the following paragraph with the marginal notation "Sovereign Immunity":

The Vice-President in charge of business and finance commented upon a report from the Interim Committee of the legislature on sovereign immunity. He referred to a letter from the Attorney General and to his reply to that letter. The Vice-President said that the Board of Regents in 1939 directed that public liability insurance be taken out

(*R.P.*, 1936-39, p. 968), and that at present the University carries a public liability policy with limits of $500,000 to $1,000,000 for bodily injury and $50,000 to $500,000 for property damage. He said that this policy also contains insurance against malpractice with an aggregate limit of $1,000,000. The liability policy in effect contains a provision that the insurer will not invoke the defense of sovereign immunity without the specific authorization of the Board of Regents in individual cases.

—Proceedings of the Board of Regents, 1960 to 1963, at 460.

Glass v. Dudley Paper Company

365 Mich. 227, 228-31; 112 N.W. 2d 489 (1961)

DETHMERS, C. J. Plaintiffs, husband and wife, sued in the Ingham county circuit court for damages resulting from injuries allegedly sustained by the wife when a glass milk container, purchased from defendant State board, crumbled in her hand. Defendant board moved to dismiss as to it on the ground of lack of jurisdiction in that court, contending that it reposes exclusively in the court of claims. The motion was granted. Plaintiffs appeal.

The question presented is a jurisdictional one. Michigan Constitution of 1908, art 11, § 8, provides that the defendant, the State board of agriculture, now known as "The Board of Trustees of Michigan State University of Agriculture and Applied Science",* "shall have the general supervision of the college, and the direction and control of all college funds". With respect to this and the like constitutional provision relating to the University of Michigan,† this Court has held that they have invested the governing bodies of the 2 universities with the entire control and management of the affairs and property of these institutions, to the exclusion of all other departments of the State government from any interference therewith. *Weinberg* v. *Regents of University,* 97 Mich 246; *Agler* v. *Michigan Agricultural College,* 181 Mich 559 (5 NCCA 897). For discussion of point, see, also, *Peters* v. *Michigan State College,* 320 Mich 243.

*See PA 1959, p. 485.—REPORTER.
†Michigan Const 1908, art 11, § 5.

It is on the above basis that plaintiffs contend that the legislature could not include the defendant board within the exclusive jurisdiction of the court of claims because this would represent an invasion by the legislature of the board's exclusive right of control of the affairs and property of the university.

It is to be noted that the mentioned constitutional article 11, § 8, in nowise empowers the board to create courts or to confer upon or withhold jurisdiction from any court. On the contrary, article 7, § 1, after establishing certain courts, provides for "such other courts of civil and criminal jurisdiction, inferior to the Supreme Court, as the legislature may establish by general law." That expressly conferred power the legislature exercised in creating the court of claims by the enactment of PA 1939, No 135 (CL 1948, § 691.101 *et seq.* [Stat Ann 1959 Cum Supp § 27.3548(1) *et seq.*]). By that act the legislature conferred exclusive jurisdiction upon the court of claims over "claims and demands", over $100, "against the State or any of its departments, commissions, boards, institutions, arms or agencies". That language is broad enough to include defendant board. In thus conferring exclusive jurisdiction on the court of claims, the legislature has also exercised the power contemplated by Michigan Constitution of 1908, art 7, § 10, which provides that:

"Circuit courts shall have original jurisdiction in all matters civil and criminal not excepted in this Constitution *and not prohibited by law.*" (Italics supplied.)

By the enactment in question jurisdiction in this matter has become prohibited to the circuit court by law.

To conclude, involved in the jurisdictional question here presented is not the power to control university affairs and property, vested by the Constitution in defendant board, but, rather, the power to fix the jurisdiction of courts inferior to the Supreme Court, vested by Constitution in the legislature. The court of claims act is, therefore, in the respect here considered, constitutional.

Order dismissing is affirmed, without costs, a public question being involved.

KELLY, BLACK, EDWARDS, KAVANAGH, and SOURIS, JJ., concurred.

CARR, J., did not sit.

OTIS M. SMITH, J., took no part in the decision of this case.

v. Board of Regents of The University of Michigan

Mich. 238, 240-43; 134 N.W. 2d 146 (1965)

T. M. KAVANAGH, C. J. Separate actions were commenced in the Washtenaw county circuit court by the various plaintiffs against the board of regents of the University of Michigan and others.

In the Fox and Mitchell cases the declarations were filed in two counts:

Count one alleged that the University Hospital, an agency controlled by the board of regents, made warranties as to the qualifications, knowledge, and skill of its agents and employees, being doctors employed at the said hospital, which qualifications were ordinarily possessed and exercised by members of the medical profession in the locality, and that the warranties were breached in that the diagnosis, treatment, and surgery performed on plaintiff was unskillfully and negligently performed, resulting in permanent injury and disability to the plaintiff.

Court two was entitled "trespass on the case," in which the claim was made that the defendant board of regents was responsible for the negligent and unskillfull performance of surgery and treatment during plaintiff's hospitalization.

Subsequent amendments to the declarations alleged breach of contract and eventually an additional amendment was filed alleging that any immunity from liability on the part of the board of regents had been waived by the purchase of a comprehensive general liability insurance policy.

The Hyma case was begun by summons. No declaration was filed.

Motions to dismiss the cases as to the regents of the University of Michigan only were filed. The motions were based upon the ruling of this Court in *Glass* v. *Dudley Paper Company,* 365 Mich 227, in which it was held that the circuit courts of this State did not have jurisdiction to entertain claims against the governing body of Michigan State University, for the reason such jurisdiction is vested by statute[1] exclusively in the court of claims. A similar rule would apply to the board of regents of the University of Michigan.

The trial court held that it did not have jurisdiction but that serious injustice would result by reason of the running of the statute of limitations in a court of claims action if dismissal were granted. The trial court instead ordered transfer of jurisdiction to the court of claims.

[1]PA 1961, No 236, § 6419 (CLS 1961, § 600.6419 [Stat Ann 1962 Rev § 27A.6419]).

On leave granted, the board of regents of the University of Michigan presented the following question:

"Can the circuit court, which has acknowledged itself to be without jurisdiction to entertain and determine the issues of fact and law presented, by reason of the court of claims act, which vests that court with exclusive jurisdiction to hear and determine claims against the defendant, enter an order transferring the cause from the circuit court to the court of claims?"

Plaintiffs contend that the General Court Rules of 1963 are to be construed to secure the just, speedy, and inexpensive determination of every action so as to avoid the consequences of any error or defect in the proceedings which does not affect the substantial rights of the parties.

Plaintiffs further contend the spirit and effect of the revised judicature act of 1961[1] is to eliminate the old concepts of "jurisdiction" and to assure that actions shall be justly and promptly heard without stilted concepts of territorial or other limitations, by permitting transfer to the proper forum if filed in an improper forum. They also argue that the law in Michigan prior to *Glass* permitted the bringing of such an action in the Washtenaw circuit court, since actions had previously been brought there and no one had ever questioned its jurisdiction. For this reason, they argue, that in justice and fairness they should not be deprived of a cause of action because of a change in the law.

Jurisdiction and venue are not the same thing. Lack of proper venue under the new General Court Rules[2] can be corrected by transfer of a cause to the proper forum; lack of jurisdiction cannot.

When a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void.

In *In re Estate of Fraser,* 288 Mich 392, this Court said (p 394):

"Courts are bound to take notice of the limits of their authority, and a court may, and should, on its own motion, though the question is not raised by the pleadings or by counsel, recognize its lack of jurisdiction and act accordingly by staying proceedings, dismissing the action, or otherwise disposing thereof, at any stage of the proceeding."

[1]CLS 1961, § 600.101 *et seq.* (Stat Ann 1962 Rev *R* 27A.101 *et seq.*).–REPORTER.

[2]GCR 1963, 404.–REPORTER.

7 MLP, Courts, § 24, p 627, is to the same effect:

"Where a court is without jurisdiction in the particular case, its acts and proceedings can be of no force or validity, and are a mere nullity and void.[1]

"A court which has determined that it has no jurisdiction should not proceed further except to dismiss the action."[2]

The orders of the circuit court in transferring the cases against the defendant board of regents of the University of Michigan to the court of claims are reversed and set aside, and the causes remanded to the lower court for entry of an order dismissing the actions.

A public question being involved, no costs are allowed.

DETHMERS, KELLY, BLACK, SOURIS, SMITH, O'HARA, and ADAMS, JJ., concurred.

Branum v. Board of Regents of University of Michigan

The Michigan Court of Appeals, Division 2 (1966)
5 Mich. App. 134, 135-39; 145 N.W. 2d 860 (1966)

McGREGOR, P.J. This action arose as the result of an injury sustained by Joyce Branum on July 2, 1963. At about 3:15 p.m., plaintiff was struck by a truck owned by the University of Michigan, being driven by Harold F. Dresselhouse, an employee of the University of Michigan. Mrs. Branum was injured when the truck left the street, went over the curb and sidewalk, and struck her. The plaintiff Carl Branum is the husband of Joyce Branum and makes his claim for loss of consortium and medical expenses of his wife.

The statement of claim was filed in the court of claims on October 3, 1963. Plaintiffs argue that the legislature of the State of Michigan did abolish the defense of governmental immunity for the State of Michigan and the board of regents of the University of Michigan, or—alternatively—that the purchase of automobile liability insurance by the board of regents of the University of Michigan did waive any claim that it might have of governmental immunity. The plaintiffs argue that, in any event, the State of Michigan would be

[1] *In re Braver* (ED Mich 1931), 51 F2d 123, affirmed by *Detroit Trust Co.* v. *Dunitz* (CCA 6, 1932), 59 F2d 905; *In re Dowling's Estate* (1944), 308 Mich 129 (probate court).

[2] *Lehman* v. *Lehman* (1945), 312 Mich 102.

liable upon the accident because the State of Michigan was, in fact, the owner of the truck, even though it was registered in the name of the board of regents of the University of Michigan. The defendants based their defense on the governmental immunity of the board of regents of the University of Michigan. They argue that the legislature of the State of Michigan could not waive the governmental immunity of the University of Michigan, as it is a constitutional corporation and not subject to the control of the legislature.

On March 22, 1965, the court of claims ordered a summary judgment of no cause of action, based upon the defendants' previous motion to dismiss.

The decision of this Court could be simplified if we could adopt the plaintiffs' arguments that purchase of automobile liability insurance by the defendant board of regents of the University of Michigan acted to waive governmental immunity of the board of regents to the extent of the insurance coverage. Opinions from the courts of some sister States have adopted such a position. *Marshall* v. *City of Green Bay* (1963), 18 Wis 2d 496 (118 NW2d 715); *Schoening* v. *U.S. Aviation Underwriters, Inc.* (1963), 265 Minn 119 (120 NW2d 859); *Taylor* v. *Knox County Board of Education* (1942) 292 Ky 767 (167 SW2d 700, 145 ALR 1333); *Marion County* v. *Cantrell* (1933), 166 Tenn 358 (61 SW2d 477); *Vendrell* v. *School District # 266 (Oregon)* (1961), 226 Or 263 (360 P2d 282). The Supreme Court of the State of Michigan had the chance to adopt such a position in the opinion of Justice BLACK in *Christie* v. *Board of Regents of the University of Michigan* (1961), 364 Mich 202, but did not adopt such a position. It is noted that Justice BLACK, in the later case of *Sayers* v. *School District # 1 Fractional* (1962), 366 Mich 217, abandoned his former position in the face of the "overwhelming edict" on the part of his fellow Justices on the Supreme Court against his position. This Court cannot, therefore, rule that the board of regents waived governmental immunity by taking out a policy of automobile liability insurance, in view of the recent action on this question by the Supreme Court of the State of Michigan.

We must decide whether the waiver of governmental immunity by the State of Michigan, PA 1961, No 236 (CLS 1961, § 600.2904, Stat Ann 1962 Rev 27A.2904) and PA 1961, No 236, CLS 1961, § 600.6475 (Stat Ann 1962 Rev 27A.6475), did waive the governmental immunity of the board of regents of the University of Michigan.

The defendants argue that historically, by judicial decisions of the Supreme Court of the State of Michigan, the board of regents of the University of Michigan has not been held subject to the control of the legislature. See *Weinberg* v. *Regents of University of Michigan*

(1893), 97 Mich 246; *Sterling* v. *Regents of University of Michigan* (1896), 110 Mich 369, (34 LRA 150); *Board of Regents of University of Michigan* v. *Auditor General* (1911), 167 Mich 444; *Robinson* v. *Washtenaw Circuit Judge* (1924), 228 Mich 225. This Court recognizes the wisdom of establishing a separate governing body of the University of Michigan, free from the political influences that are necessarily a part of a State legislature. This Court recognizes that such independence must be maintained in educational matters in order to provide the highest quality education for the students of Michigan, and in order to maintain the outstanding national reputation of the University.

In spite of its independence, the board of regents remains a part of the government of the State of Michigan. The Supreme Court of the State of Michigan has ruled that the judicial doctrine of governmental immunity no longer exists in Michigan. Justice EDWARDS, in *Williams* v. *City of Detroit* (1961), 364 Mich 231, 250, so ruled, and was concurred in by three other justices. It is clear that the public policy of Michigan is that the defense of governmental immunity to tort actions should no longer exist.

The governing bodies of both the University of Michigan and Michigan State University are equal in both creation and power. In *Peters* v. *Michigan State College* (1948), 320 Mich 243, the Supreme Court, by handing down a split 4-4 decision, affirmed the lower court decision that Michigan State College was not immune from the workmen's compensation act. It is the opinion of this Court that the legislature can validly exercise its police power for the welfare of the people of this State, and a constitutional corporation such as the board of regents of the University of Michigan can lawfully be affected thereby. The University of Michigan is an independent branch of the government of the State of Michigan, but it is not an island. Within the confines of the operation and the allocation of funds of the University, it is supreme. Without these confines, however, there is no reason to allow the regents to use their independence to thwart the clearly established public policy of the people of Michigan.

The decision of the court of claims is reversed and the case remanded to the court of claims for determination upon the merits. No costs are awarded because of the public nature of the questions involved.

T. G. KAVANAGH and J. H. GILLIS, JJ., concurred.

Huckins v. Board of Regents of University of Michigan

263 F. Supp. 622 (E.D. Mich. 1967)

LEVIN, Chief Judge.

This suit is based on three counts: I, the Jones Act, 4C U.S.C. § 688; II, unseaworthiness; and III, the duty of maintenance and care, the latter two counts under the general maritime law. The plaintiff was employed as a seaman by the defendant on the Myscis, a vessel owned by the defendant and used by it for scientific purposes on the Great Lakes and connecting tributaries, and alleges that the injuries occurred on July 8, 1964, while in the course of that employment. The defendant, the Board of Regents of the University of Michigan, a corporation created by the Constitution of the State of Michigan and generally known as a constitutional corporation, moves to dismiss or in the alternative for summary judgment on the ground that it is immune from liability and suit under the eleventh amendment to the Constitution of the United States.

[1] The motion to dismiss Count I is denied. The Jones Act provides in part:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply * * * ."

The Federal Employers' Liability Act (FELA), to which the Jones Act refers, provides in part:

"Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * " and that "[u]nder this chapter an action may be brought in a district court of the United States * * * ." 45 U.S.C. §§ 51, 56.

In Parden v. Terminal Railway of Alabama State Docks Department et al., 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964), the Supreme Court held that Congress intended to subject a state to suit under the FELA and had the authority under the commerce clause to do so.

[2] The Jones Act, by express language, gives seamen injured in the course of their employment the equivalent rights available to railway employees. It is clear that Congress intended and had the power to subject a state to suit in a federal court under the Jones Act just as it did under the FELA. See Cocherl v. State of Alaska, 246 F.Supp. 328 (D.Alaska 1965).

[3] Counts II and III, based on the maritime law and not on congressional enactment, are dismissed. The eleventh amendment of the United States Constitution precludes suits against a state under the general maritime law in federal court absent the consent of the state. In Copper Steamship Co. v. State of Michigan et al., 194 F.2d 465, 468 (6th Cir. 1952), a libel against the State of Michigan for property damage caused by one of its ferries, the court said:

"We are of the opinion that the logical overall construction of the Court of Claims Act is that Michigan created a court to hear all claims against the State with the exception of any claims that were or might be enforcible in the federal courts; that with respect to claims of either nature a 3-year state of limitations would be applicable; and that there was no intention in creating the Court of Claims to enlarge or extend the existing jurisdiction of the federal court over the State or any of its departments, commissions, or agencies. This was the construction given to the Act by the Michigan Supreme Court in Manion v. State Highway Commissioner, 303 Mich. 1, on page 22, 5 N.W.2d 527, 529, where, in a case involving the Act, the Court stated: 'Nor has the State waived its immunity from suit for a maritime tort in the courts of the United States.' This expression of opinion was not necessary for the ruling which the Court gave in that case, and is not binding upon us as is usually the case where the state court of last resort has given its construction of a statute of the State. [omitting citations] However, it is persuasive as being in accord with our own view in this matter."

[4] The plaintiff argues that the rules governing the immunity of municipalities are different from those governing the immunities of a state and that the Board of Regents of the University of Michigan is more akin to a municipality, and therefore the rule of the *Copper* case would not apply. It is not necessary to consider the law applicable to municipalities, as I am not persuaded by the analogy. The immunity of a state extends to its agencies and departments. The Board of Regents of the University of Michigan is a unique constitutional corporation, and is similar to a department of the state.

[5] The plaintiff also argues that the defendant waived its immunity by the purchase of liability insurance and cites Christie v.

Board of Regents of University of Michigan, 364 Mich. 202, 111 N.W.2d 30 (1961), in support of his position. In Grant v. Cottage Hospital Corp., 368 Mich. 77, 79, 117 N.W.2d 90 (1962), the court held that purchase of insurance by a hospital did not waive its immunity from suit and also remarked:

"The majority opinion in Christie v. Board of Regents of University of Michigan, supra, is not to the contrary since the effect of that opinion was simply to require the production of insurance policies *for examination* in order that a plaintiff might plead. There was no determination that, once having pleaded a waiver by the purchase of insurance, the plaintiff would have pleaded a good cause of action. That issue is here now determined adversely to the pleader."

Even if the existence of liability insurance had amounted to a waiver of immunity from suit, the State of Michigan did not consent to such suit in the federal court.

It is of interest to note that Public Act No. 170 of the Public Acts of 1964, Comp. Laws 1948, § 691.1401 et seq. M.S.A. § 3.996(101) et seq., effective July 1, 1965, subsequent to this accident, waives governmental immunity in certain cases. The case before the court is not one of them.

[6] The motion to dismiss Count I is denied; the motion to dismiss Counts II and III is granted; and the motion for summary judgment in the alternative, with respect to Count I, is denied because there are genuine issues of material fact.

MacDonald v. Board of Regents of University of Michigan

371 F. 2d 818 (6th Cir., 1967)

PER CURIAM.

Plaintiff-appellant is a citizen and resident of the Province of Nova Scotia, Canada. On February 2, 1965, she filed suit in the United States District Court for the Eastern District of Michigan against the Board of Regents of the University of Michigan, alleging that while a patient in the University of Michigan Hospital, she had suffered injuries as a result of the negligence of employees of that hospital.

Appellee Board of Regents filed an answer in this cause on February 24, 1965. On June 29, 1965, a pretrial order was entered by the United States District Judge which recited in part: "Defendant

contemplates filing a motion challenging the jurisdiction of this Court and such motion shall be filed without delay." The order also granted defendant leave to amend its answer within 15 days in order to challenge jurisdiction.

Subsequently, on July 6, 1965, the Board of Regents filed a motion to dismiss, alleging: "That this court is without jurisdiction to hear the issues here involved and that the plaintiff's exclusive remedy, if any, is with the Court of Claims of the State of Michigan."

The parties concede that the defendant here, the Board of Regents of the University of Michigan, is for all legal purposes one and the same as the State of Michigan itself.

The Eleventh Amendment of the Constitution of the United States provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Appellant concedes that absent appellee's answer in this cause, the Eleventh Amendment would be a final bar to the United States District Court having jurisdiction over this litigation. Appellant, however, argues that filing of an answer should be read by this court, and should have been by the District Judge, as a waiver of its right to assert lack of jurisdiction.

We do not believe that a constitutional proscription against the judicial power of the United States being construed to extend to any suit commenced by a citizen of a foreign state against one of the United States can be waived by such a technical error. Ford Motor Co. v. Dept. of Treasury of State of Indiana, 323 U.S. 459, 65 S.Ct. 347, 89 L. Ed. 389 (1945).

In the *Ford* case, the claim of lack of jurisdiction due to the Eleventh Amendment was first made and argued by the state in the Supreme Court. The Supreme Court therein stated:

"This was in time, however. The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court." Ford Motor Co. v. Department of Treasury of State of Indiana, supra at 467, 65 S.Ct. at 352.

The order of the District Court is affirmed.

3. OPINIONS OF ATTORNEY GENERAL

The statutes which provide for the treatment of children and poor people at the state expense by University Hospital have been the subject of many opinions of the Attorney General. In 1911 and again in 1920 the Attorney General read the statutes in an extremely literal way and ruled that the statutory words "medical care" did not include surgery for children.[1] In 1915, however, the Attorney General was able to demonstrate that he could read language more liberally when he ruled that the words "University Hospital" included the homeopathic hospital which was then operated by the University.[2]

In other rulings under these same laws, the Attorney General, in 1919, ruled that the superintendent of University Hospital could not refuse to admit a child brought to the hospital under an order of Probate Court[3]; but in more recent opinions the Attorney General has ruled that the admission of state patients to the Neuropsychiatric Institute and the tuberculosis unit of University Hospital are subject only to the rules of the Board of Regents and not subject to the provisions of the Michigan Afflicted Children's Act or the regulations at the Tuberculosis Sanitarium Commission.[4]

Despite the University's acknowledged constitutional independence in the framework all ready discussed in Chapters II and III, it is clear from subsequent rulings of the Attorney General that the University continued to cooperate with other state authorities who were acting under the various statutes. Under these laws, the Attorney General has ruled that a Judge of Probate may commission any person to transport children to University Hospital at state expense.[5] The word "child" in the statutes was defined as any person who has not attained his majority.[6] The authority of the former county superintendents of the poor to guarantee expenses at University Hospital has been examined,[7] and the procedure for submitting separate invoices to the state for the same patient who received treatment under two different laws was prescribed in another opinion.[8] In 1943, on the request of a social worker, the Attorney General was able to find four different sets of statutory provisions under which a child with homicidal tendencies might qualify for commitment at state expense to the Neuropsychiatric Institute on

either a permanent or a temporary basis.[9] In the same year the Attorney General ruled that the University could not collect additional charges from a patient admitted at state expense even though the patient could collect under an insurance policy.[10]

A rather startling number of rulings have been issued under statutes providing that unclaimed bodies for which no private person has paid burial expenses shall be shipped to the Medical School for the use of its students. As early as 1886 the Attorney General ruled that the body of a deceased inmate of the Northern Michigan Asylum (today, the Traverse City State Hospital) might be buried at the asylum at the request of her widower even though the widower did not provide funds for burial.[11] By 1890, however, the Attorney General's office seems to have abandoned its earlier position, and it ruled that the only alternative to shipment to the Medical School was burial at private expense.[12] In 1907, the office made it clear that the statutory maximum of $15.00 for packing and shipping cadavers to the Medical School could not be exceeded,[13] and, in 1910, the superintendent at Traverse City, who had requested most of the opinions in this series, was informed that he must continue to ship cadavers to Ann Arbor despite the fact that the Medical School was then oversupplied since the statute did not make any other provision for such a contingency.[14] As late as 1930, the Attorney General had to advise the Auditor General that he should not pay for burial at public expense despite an order of the Circuit Court since the body should have been shipped to Ann Arbor.[15]

A few opinions of the Attorney General have been concerned with the sovereign immunity of state institutions of higher education. In 1926, on the authority of the *Robinson* case, he ruled that University Hospital was not liable for burns suffered by a patient because of the negligence of an employee.[16] A 1939 ruling held that the legislature could not waive the sovereign immunity of the then Michigan State College, and, therefore, a statute granting jurisdiction to the Claims Committee of the State Administrative Board to decide small claims was not constitutional as applied to claims against the college.[17] (This opinion was overruled by the *Branum* case discussed in this chapter.) Finally, in 1948, the members of a faculty committee in charge of athletics at Central Michigan College were told that

incorporation could not protect them from personal liability for injuries to athletes or patrons if their own negligence was the proximate cause of the injuries.[18]

4. STATUTE ON JURISDICTION OF COURT CLAIMS

P.A. 1961, No. 236, § 6419, Eff. Jan. 1, 1963

AN ACT to revise and consolidate the statutes relating to the organization and jurisdiction of the courts of this state; the powers and duties of such courts, and of the judges and other officers thereof; the forms and attributes of civil claims and actions; the time within which civil actions and proceedings may be brought in said courts; pleading, evidence, practice and procedure in civil actions and proceedings in said courts; to provide remedies and penalties for the violation of certain provisions of this act; and to repeal all acts and parts of acts inconsistent with, or contravening any of the provisions of this act.

The People of the State of Michigan enact:

600.6419 Court of Claims

(1) Except as provided in section 6440, the jurisdiction of the court of claims as conferred upon it by this chapter over claims and demands against the state or any of its departments, commissions, boards, institutions, arms or agencies, shall be exclusive. The state administrative board is hereby vested with discretionary authority upon the advice of the attorney general, to hear, consider, determine and allow any claim against the state in an amount less than $100.00. Any claim so allowed by the state administrative board shall be paid in the same manner as judgments are paid under section 6458 upon certification of the said allowed claim by the secretary of the state administrative board to the clerk of the court of claims. The court has power and jurisdiction:

(a) To hear and determine all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments, commissions, boards, institutions, arms or agencies.

(b) To hear and determine all claims and demands, liquidated or unliquidated, ex contractu or ex delicto, which may be pleaded by way of counterclaim on the part of the state or any department, commission, board, institution, arm or agency thereof

against any claimant who may bring suit in such court. Any such claim of the state or any department, commission, board, institution, arm or agency thereof may be pleaded by way of counterclaim in any action brought against the state, or such or any other department, commission, board, institution, arm or agency of the state.

(2) The judgment entered by the court of claims upon any such claim, either against or in favor of the state or any department, commission, board, institution, arm or agency thereof, upon becoming final shall be res adjudicata of such claim. Upon the trial of any cause in which any demand is made by the state or any department, commission, board, institution, arm or agency thereof, against the claimant either by way of setoff, recoupment, or cross declaration, the court shall hear and determine each of such claims or demands and if the court shall find a balance due from the claimant to the state it shall render judgment in favor of the state for such balance. Writs of execution or garnishment may issue upon said judgment the same as from one of the circuit courts of this state. The judgment entered by the court of claims upon any such claim, either for or against the claimant shall be final unless appealed from as herein provided.

(3) The court of claims shall not have jurisdiction of any claim for compensation under the provisions of either:

(a) Act No. 10 of the Public Acts of the First Extra Session of 1912, as amended;

(b) Act No. 93 of the Public Acts of 1929, being sections 17.91 and 17.92 of the Compiled Laws of 1948, as amended; or

(c) Act No. 329 of the Public Acts of 1937, as amended.

(4) This chapter shall not be construed so as to deprive the circuit courts of this state of jurisdiction over actions brought by the taxpayer under the provisions of Act No. 167 of the Public Acts of 1933 or any other actions against state agencies based upon the statutes of the state of Michigan in such case made and provided, which expressly confer jurisdiction thereof upon the circuit courts, nor of the proceedings to review findings as provided in Act No. 1 of the Public Acts of the Extra Session of 1936, or any other similar proceedings expressly authorized by the statutes of the state of Michigan in such case made and provided.

(CL '48, § 600.6419.)

FOOTNOTES

Section 1 - Introduction

1. The decisions mentioned appear after the Introduction.
2. See *supra* 248.

Section 3 - Opinions of Attorney General

1. 1912 Mich. Op. Att'y. Gen. 199; 1921-22 Mich. Op. Att'y. Gen. 77.
2. 1916 Mich. Op. Att'y. Gen. 164.
3. 1919 Mich. Op. Att'y. Gen. 164.
4. 1943-44 Mich. Op. Att'y. Gen. 419; 1943-44 Mich. Op. Att'y. Gen. 771; 1930-32 Mich. Op. Att'y. Gen. 25.
5. 1920 Mich. Op. Att'y. Gen. 72.
6. 1921-22 Mich. Op. Att'y. Gen. 382.
7. 1928-30 Mich. Op. Att'y. Gen. 139.
8. 1943-44 Mich. Op. Att'y. Gen. 195.
9. 1943-44 Mich. Op. Att'y. Gen. 600.
10. 1943-44 Mich. Op. Att'y. Gen. 650.
11. 1886 Mich. Op. Att'y. Gen. 51.
12. 1890 Mich. Op. Att'y. Gen. 13.
13. 1908 Mich. Op. Att'y. Gen. 95.
14. 1910 Mich. Op. Att'y. Gen. 262.
15. 1930-32 Mich. Op. Att'y. Gen. 25.
16. 1926-28 Mich. Op. Att'y. Gen. 33.
17. Unpublished opinion, No. 11937, dated August 23, 1939.
18. Unpublished opinion, No. 692, dated May 11, 1948.

CHAPTER VIII

THE UNIVERSITY AND LOCAL GOVERNMENT: ZONING AND PROPERTY TAXES

1. INTRODUCTION

The relations between a state university and local governments are discussed in this chapter. Probably the most noticeable area of potential conflict between university and municipal authorities relates to the application of local zoning ordinances to the construction and operation of the physical plant of the university. So far, no case has been decided by the appellate courts of Michigan on this exact point, but it is the subject of several opinions of the Attorney General.

The cases do, however, deal with a second subject which affects the relations between city and university, i.e., the exemption of university property from taxation. Since property taxes are so important to the support of local government and since a university is likely to own a large amount of property in the city in which it is located, the exact applicability of its tax exemption is very important.

Three cases have been decided by the Michigan Supreme Court which have determined the extent to which the property of the University of Michigan is exempt from taxation. The first case, *Aplin,*[1] decided in 1890, held that the property of the University of Michigan was exempt from taxation as state property, and not as the property of an educational institution. This distinction was important because the statute exempting the property of incorporated educational institutions from taxation limited the exemption to real estate "occupied by them for the purposes for which they were incorporated." The land involved in the case was Detroit real estate which apparently had not been recently used for educational purposes.

MacKinnon Boiler, the next case in this series, modified the rules by permitting one minor exception which embraced

vacant lots not used by the University. They were declared to be subject to special assessment taxes for local improvements. Since these local improvements add to the value of the property subject to the tax, this exception to the rule should not unduly burden the University.

The broadest attack on the tax exemption of the University came in the final case in this series, *Lucking v. People.* An Ann Arbor taxpayer brought suit against the State of Michigan and the University of Michigan seeking to force the payment of real estate taxes to the City of Ann Arbor on certain properties of the University which, he did not think were being used for purely educational purposes. The Supreme Court adhered to its precedents and the suit was dismissed.

Despite the establishment of the rule, however, there are enormous practical problems involved when a city which must depend for its support upon property taxes finds that a large share of the property within the city is exempt from taxation. Both the city and the university can be injured if the city cannot provide adequate services. In order to remedy this problem, a statute[2] provides that state universities may enter into agreements with the cities in which they are located for police and fire protection. The agreement between the City of Ann Arbor and the Regents of the University of Michigan is appended to this chapter.

2. JUDICIAL DECISIONS

Aplin v. The Regents of The University of Michigan

83 Mich. 467, 467-71; 47 N.W. 440 (1890)

> CHAMPLIN, C. J. Prior to July 1, 1888, certain land situated in the city of Detroit, the title of which was vested in the Regents of the University of Michigan by a grant from Walter Crane, bearing date March 22, 1880, was and has since the date of such deed been held for corporate purposes. This land was assessed upon the general tax roll of the city for the year 1887, and was returned as delinquent, and the bill is filed in this case under Act No. 195, Laws of 1889 (3 How. Stat. p. 2936), to enforce collection of such taxes. No question

is made concerning the title to the land, and the only question presented is whether the land was exempt from taxation.

The legislation affecting the organization of the University of Michigan is given in the case of *Regents v. Board of Education,* 4 Mich. 213, and need not be here repeated. Section 7 of Article 13 of the Constitution which was adopted in 1850 declares that—

"The Regents of the University, and their successors in office, shall continue to constitute the body corporate known by the name and title of 'The Regents of the University of Michigan.' "

Section 8 of the same article declares that—

"The board of regents shall have the general supervision of the university, and the direction and control of all expenditures from the university interest fund."

By these provisions the body corporate, which was at first the creation of the legislative will, has received the sanction of the Constitution, and has become a part of the fundamental law, and in some respects is not subject to legislative control or interference. It is not, however, independent of, but is part of, the State, a department to which the education of the people in the higher branches of literature, science, and the arts is confided. As such it is fostered by the State. Appropriations are made which are raised by taxation upon the property of individuals of the State. A tax is also imposed of one-twentieth of a mill upon the taxable property of the State for the support of a university. The public character of the institution has been recognized and declared in repeated decisions of this Court. It was said in the case of *Regents v. Board of Education,* above referred to, that the corporation has been since its incorporation in 1837—

"A public corporation, created for public purposes alone. * * * The institution was erected and has been supported by a public fund, and the corporators have no private interest whatever connected with their corporate character." And again it was said that—"the corporation was created for the purpose of administering a great public trust, and the present plaintiffs are but trustees for the same great purpose."

In the case of *Regents v. Detroit Young Men's Society,* 12 Mich. 163, it was said:

"The University of Michigan is a public corporation. The people, in their political capacity, are the corporators. It is a part of the

educational system of the State, and is under the control of the Legislature, except so far as it has been placed beyond the reach of that body by the Constitution and the trust attached to the university fund. * * * It was a public corporation originally, and has been throughout. It was created to subserve a great public want,—the education of the people."

Exemption from taxation is claimed under the provision of the first subdivision of section 3 of Act No. 153, Laws of 1885 (3 How. Stat. § 11692), which provides that all public property belonging to this State shall be exempt from taxation.

It is contended that all of the property of the University of Michigan is public property of this State within the meaning of the above exemption. We are of the opinion that the land in question is exempt from taxation under the terms of the above statute. The property held by the Regents of the University of Michigan in their corporate capacity is the public property of the State held by the corporation in trust for the purposes to which it was devoted.

It does not follow that the State can have no property except such as is in the control and at the disposition of the Legislature. The Legislature is not the State, but only a department of the State. All subjects of legislation otherwise than such as are excepted from their authority by the Constitution are within their jurisdiction and control. They have said that all public property belonging to the State shall be exempt from taxation. The public property belonging to the State includes the property of all public departments of the State; such as the Michigan University, the Reform School, the School for the Deaf and Dumb, the State prisons, the asylums, the Agricultural College, the State Normal School, and other public institutions supported by the State through taxation or by funds or property appropriated by public or private generosity for that purpose. It cannot be supposed that the Legislature would make large appropriations for the support of these institutions, or levy taxes for the same purpose, and then assess the property held by them in trust to carry out the same object for which such taxes are levied.

It is claimed by the solicitor for petitioner that the second subdivision of section 3 is the one applicable to the Michigan University, which exempts the personal property of library and scientific institutions incorporated under the laws of this State, and such real estate as shall be occupied by them for the purposes for which they were incorporated. We think it plain that the language of this subdivision cannot apply to the class of institutions above enumerated as exempt under the first subdivision. It refers to such institutions as are incorporated under the general laws of the State for library,

benevolent, charitable, and scientific purposes, and not those institutions which may be regarded as departments of the State provided for in the organic law, or supported by direct taxation.

The decree is affirmed, without costs.

The other Justices concurred.

Auditor General v. MacKinnon Boiler & Machine Company

199 Mich. 489, 489-96; 165 N.W. 771 (1917)

BIRD, J. In the year 1905 C. A. Kent of Detroit conveyed certain lands in Bay City to the regents of the university, the same being a gift, for the use and benefit of the university. Subsequently the regents sold a portion thereof to petitioner. Prior to the sale, however, a special assessment for sewer purposes had been made thereon by the local authorities. The assessment remaining unpaid the premises were included in the auditor's annual petition filed in the circuit court of Bay county for the sale of lands for delinquent taxes. Petitioner intervened and made the objection that at the time the assessment was made it was the property of the university, and therefore invalid, as no valid tax or assessment could be levied thereon. This objection was overruled at the hearing, and petitioner has appealed.

1. The one question presented for solution is whether vacant real estate owned by the university, but not actually used for any purposes in connection with its affairs, can be subjected to a special assessment for local improvements. Counsel for relator argues that the assessment is invalid on the ground that the board of regents is a constitutional body, has independent control of the affairs of the university, and therefore its property is not subject to the acts and control of the legislature.

We think it is clear that if this property is exempt from the assessment in question it must be so by force of some legislative acts. The Constitution does not deal with exemptions from taxation. There being no constitutional restriction on this power of the legislature, it follows that it can exercise the power of exemption as it chooses. It has exercised this power by declaring in section 7 of the tax law that "all public property belonging to the State of Michigan shall be exempt from taxation." 1 Comp. Laws 1915, § 4001. This and similar language has been the subject of much construction by the courts, and in the majority of cases it has been held not to include

special assessments for local improvements. *Chicago Schools* v. *City of Chicago,* 207 Ill. 37 (69 N. E. 580); *State* v. *Robertson,* 24 N. J. Law, 504; *School District of Ft. Smith* v. *Board of Improvement,* 65 Ark. 343 (46 S. W. 418); *Sioux City* v. *School District,* 55 Iowa, 150 (7 N. W. 488); *City of Atlanta* v. *Presbyterian Church,* 86 Ga. 737 (13 S. E. 252; 12 L. R. A. 852); *Hassan* v. *City of Rochester,* 67 N. Y. 528; *Sewickley M. E. Church's Appeal,* 165 Pa. 475 (30 Atl. 1007); *Inhabitants of Essex County* v. *City of Salem,* 153 Mass. 141 (26 N. E. 431); Cooley on Taxation (2d Ed.), p. 172.

The holding in most of the cases is that these words of exemption apply only to *general* taxation. It appears, however, to have been settled in this State that these words of exemption protect public property from local assessments (*City of Big Rapids* v. *Board of Sup'rs of Mecosta Co.,* 99 Mich. 351 [58 N. W. 358]); but this has been construed to mean such property as is used for governmental purposes (*Newberry* v. *City of Detroit,* 164 Mich. 410 [129 N. W. 699, 32 L. R. A. (N. S.) 303]). In this case it was held that a public park was not exempt from special assessment for paving purposes because not being used for governmental purposes. If the general words of exemption in the statute do not apply to property owned by a municipality which is not used for governmental purposes, a like reasoning seems to lead to the conclusion that real estate owned by the university, but not used for governmental purposes, would not be included within the exemption. The university as well as the municipality is a corporate entity, made so by force of the Constitution, and both are State agencies.

The reason which underlies the exemption of public property from general taxation is that it would be without profit to assess public property as the tax would have to be paid out of the general fund to which all contributed, but this reason does not exist when special assessments are made for local improvements. Whenever property is exempt from special assessment the remaining property owners included within the special assessment district must pay for the benefits which accrue to the exempt property. This is so manifestly unfair that I am of the opinion that it was not the intention of the legislature to exempt property from special assessments which was owned but not used by the public authorities for governmental purposes. This question was before the California court on a similar state of facts involving its university, and the same arguments were urged in support of the exemption. But that court held that inasmuch as the property of the university was not made use of in connection with the affairs of the university, it was subject to the special assessment. It was there said in part:

"The principle is well established that where any of such lands are not directly and necessarily used for a public purpose they may be subjected to the payment of special assessments for benefits. And this is in consonance with justice and equity. For to assess certain lot owners upon a street for all the cost of the work, part of which is for the benefit of a public institution, is to enhance the value of the university property at the expense of the few, instead of by taxation upon all the people at the expense of all. So it is said in *Hassan* v. *City of Rochester,* 67 N. Y. 528:

" 'A different rule would compel individual lot owners to pay assessments levied for improvements which were a benefit to the State lands, without any adequate advantage, and in many instances impose a burden which would be extremely onerous and produce great injustice.' " *City Street Imp. Co.* v. *Regents of the University of California,* 153 Cal. 776 (96 Pac. 801, 18 L. R. A. [N. S.] 451).

In view of the fact that the record discloses that the property in question was vacant unimproved lots in the city of Bay City, and that they were not being used for governmental purposes of the university, we think the conclusion of the trial court should be affirmed.

KUHN, C. J., and MOORE, STEERE, and BROOKE, JJ., concurred with BIRD, J.

FELLOWS, J. *(dissenting in part).* I am for affirmance, but not for the reasons stated by Mr. Justice BIRD, and by the learned trial judge. I do not agree that a municipal unit of the State may enforce by sale for delinquency a special assessment upon the property held by its creator, the sovereign, the State, even though such property be not in use for governmental purposes, nor that this court committed itself to such doctrine by the case of *Newberry* v. *City of Detroit,* 164 Mich. 410 (129 N. W. 699, 32 L. R. A. [N. S.] 303). That case involved a special assessment for paving purposes, and the question involved was whether the city should assess upon property owned by itself and not used for governmental purposes its proportion of the costs. The charter provision was as follows:

"For the purpose of such assessment, the lots and parcels of real estate situated on said street, and fronting the portion thereof ordered to be improved, shall constitute one local assessment district"; * * * the cost and expense of the paving to be assessed according to frontage. Detroit Charter 1904, §§ 266, 267, pp. 182-184.

It was held that the municipality should assess upon its own property, not used for governmental purposes, its proportion of the cost of the local improvement, and that such property was not exempt from such special assessment. This was the question there before the court and there decided. That case is not authority to the point that property owned by the State is subject to sale for failure to pay local assessments, but only to the point that property owned by the municipality, and not used for governmental purposes, should pay its proportion of the cost of local improvements made under the provisions of its charter. In the instant case the State parted with its title to the property on June 24, 1912. On March 24, 1913, the tax roll for this special assessment was approved by the board of public works, and the certificate of the comptroller was attached and the entire assessment approved May 1, 1913. The ordinance ordering the improvement was passed July 3, 1911, but this special assessment did not become due until nearly a year after the State had parted with its title and the property had become subject to private ownership. In the case of *Case* v. *City of Saginaw,* 196 Mich. 687 (163 N. W. 115), the writer expressed the view:

"That the lands were not liable for special assessments falling due while they were owned and held by the State, but were liable for such special assessments as became due after they became subject to private ownership."

I am unable to distinguish the facts in that case from those in this case. There, as here, the property was vacant city property, used for no governmental purpose; it had been bid off by the State for delinquent taxes. One of the special assessments in that case, as was the assessment in the instant case, was for the construction of a sewer. Entertaining the views there expressed, I think this case should be affirmed.

OSTRANDER, J. *(dissenting).* It is a sound rule, approved by this court (*City of Big Rapids* v. *Board of Sup'rs of Mecosta Co.*, 99 Mich. 351 [58 N. W. 358]), that property owned by the State, or by the United States, or by a municipality for public uses, is not subject to taxation, unless so provided by positive legislation. The rule is the same whether the tax sought to be imposed is a general or a special tax, an exaction for general or for special local purposes. The application of the rule is not affected by the fact that the legislature may have expressly exempted such property *from taxation.*

In *Iron Mountain Public Schools* v. *O'Connor,* 143 Mich. 35 (108 N. W. 426), it appeared that after land had been listed for taxation, the roll completed, approved by the board of review, and

returned to the board of supervisors for equalization, the petitioner bought the land for school purposes. Subsequently, the tax was spread thereon and not paid. The land was returned delinquent and sold at the annual tax sale under the usual decree. The school district filed its petition to vacate and set aside the decree and cancel and set aside the deed made upon the sale. There was a demurrer to the petition, which was overruled. The order overruling was set aside by this court upon the ground that the land was subject to the assessment when it was made and when the township board of review passed upon and reviewed the assessment, and no power was lodged in any person to thereafter take from the roll property listed therein; that there must be some definite period when a purchaser, whose property is generally exempt, must purchase property subject to the tax levied or to be levied thereon. Usually, the question whether a tax must be paid by one person or by another arises in cases where the land is subject to taxation, and between the vendor and the purchaser. No such question is involved here.

The land here was not liable to assessment when the proceeding to assess it was begun because it belonged to the State. The title, it is true, was in the regents. But as affecting the question here involved the beneficial owner was the State. *Auditor General* v. *Regents of University,* 83 Mich. 467 (47 N. W. 440, 10 L. R. A. 376). Under the rule stated, it was not liable to be assessed for a special improvement because it belonged to the State, and there was no law which permitted land so owned to be subjected to assessment and sold for a tax or levy for special improvements. The title to the land passed to the regents of the university in 1905. The regents sold it to appellant in June, 1912. Before that time the city of Bay City had ordered the construction of the sewer, a survey and estimate of cost had been made, reported and approved, a contract for the construction of the sewer had been let, and the sewer was completed in the summer of 1912. The roll of the special assessment was made and approved in March, 1913. The proceeding was a single one; the validity of the assessment depending upon the lawfulness of the first quite as much as upon the legality of the last step or act taken therein. As between the municipality instituting the proceeding and its officers and the land in question, jurisdiction to subject it and its owner to the exaction attached when the proceeding was instituted. Appellant bought it subject to no lien. It purchased it from an owner in whose hands it was not liable to the assessment.

It is my opinion, therefore, that the decree should be reversed and one entered annulling the tax complained about.

STONE, J., concurred with OSTRANDER, J.

Lucking v. People

320 Mich. 495, 498-505; 31 N.W. 2d 707 (1948)

BOYLES, J. Plaintiff herein, as a resident of Washtenaw county and one of the testamentary trustees of the estate of Alfred Lucking, deceased, the owner of real estate in the city of Ann Arbor, filed this bill of complaint in the circuit court for the county of Washtenaw in chancery, said to be on behalf of himself and all other taxpayers of said city, and naming as defendants the people of the State of Michigan, the regents of the university of Michigan, and the city of Ann Arbor. The prayer of the bill seeks the following relief:

That the board of regents of the university be estopped from claiming that the lands, buildings and equipment of the university within the city limits are exempt from taxation by said city; that said property be placed upon the general tax rolls of said city; that the university hospital, the athletic buildings and stadium, the Michigan Union and the Michigan League buildings, and the Hill auditorium, not used solely for educational purposes, be placed upon said tax rolls; that an accounting of the purposes and uses and values of all other university property be had and that their taxability or nontaxability be determined by the court; that the defendants State of Michigan and regents of the university be required to account to the city of Ann Arbor for all sums of money expended since the enactment of the Michigan Constitution (1908) for the protection, support, upkeep and maintenance of the lands, buildings and equipment of the university within the corporate limits of said city of Ann Arbor, and that final "judgment" be entered therefor against the State of Michigan and said board of regents; that the State of Michigan and the said board of regents be enjoined from claiming any exemption from taxation in the future except as an educational corporation or institution, and then only as to such lands, buildings and equipment as are occupied and used solely for educational purposes; that the exemption from taxation by the city of Ann Arbor of the property of the university of Michigan within the city limits be decreed to be invalid as the taking of said city's property and its taxpayers' property without due process of law and without the equal protection of the laws; that the tax exemption statutes of the State of Michigan be adjudged to be unconstitutional as a violation of the 14th amendment of the Federal Constitution, and the Constitution of Michigan; that a "judgment" be entered against the people of the State of Michigan and the board of regents of the university in favor of the city of Ann Arbor for all sums expended by said city to maintain the university of Michigan since the effective date of the

Michigan Constitution (1908); that the city of Ann Arbor be required to protect and enforce the rights and interests of the taxpayers of said city as against the people of the State of Michigan and the board of regents of the university; that the court require the people of the State of Michigan and the board of regents of the university to account to the plaintiff and the city of Ann Arbor for the reasonable value of all services furnished by said city to the people of the State of Michigan and said board of regents since August 28, 1929; and that the court find by a declaratory "judgment" the rights of the plaintiff as an individual, and as representing the taxpayers, and enforce the same against the people of the State of Michigan, the regents of the university, and the city of Ann Arbor, by final judgment and injunction of the court.

On filing the bill of complaint, service of process on the people of the State of Michigan was made by serving summons on the governor and the attorney general. The attorney general, on behalf of the people of the State of Michigan, entered a special appearance and moved to set aside the service of process on the ground that the State could not be sued without its consent and that the State had not so consented. The board of regents of the university filed an answer in the form of a motion to dismiss the bill of complaint on the above ground, that the plaintiff was not authorized to institute the suit, and that the bill of complaint did not state facts sufficient to constitute a valid cause of action in equity or at law. The city of Ann Arbor did not file a motion to dismiss, but filed an answer to the bill of complaint, concluding with a prayer that the bill of complaint be dismissed.

Judge Robert M. Toms of the Wayne circuit court, sitting in the Washtenaw circuit, after hearing the motions and considering briefs filed, entered an order setting aside the service of process as to the people of the State of Michigan, and dismissing the bill of complaint both as to the defendant board of regents and the defendant people of the State of Michigan. The trial court held that inasmuch as no motion to dismiss had been made by the city of Ann Arbor, the cause would stand at issue as between the plaintiff and that municipality. From the aforesaid order of dismissal, the plaintiff appeals. The record here does not indicate what further action, if any, has been taken in the case against the city of Ann Arbor.

The bill of complaint, consisting of some 70 paragraphs, consists mainly in statements of law, conclusions therefrom, and arguments in relation thereto. However, well-pleaded material allegations of fact must be taken as true. The substance of the bill of complaint is that city of Ann Arbor is now and has been giving free fire and police protection and other city services to the property owned by

the people of the State of Michigan, under the control of the board of regents, for which no compensation has yet been paid to the said city of Ann Arbor; that the State of Michigan should pay into the treasury of the city of Ann Arbor as a reasonable value for such services at least $200,000 per year; that the regents of the university have received from said city the same fire protection and other city services as do all property owners and taxpayers, that the students in the university have received municipal advantages and facilities, including fire and police protection and the use and enjoyment of city parks and streets, transportation, lighting and water, the same as used by taxpayers of said city; that for those reasons the State of Michigan is estopped from claiming that the lands, buildings and equipment of the university of Michigan within said city limits are exempt from taxation by said city; that some of said lands, buildings and equipment are actually used and occupied as noneducational facilities for profit-making purposes, that upwards of $20,000,000 of the assets of the university are unlawfully exempted from taxation of the city of Ann Arbor in that they are not occupied solely for educational purposes.

As to the defendant, the people of the State of Michigan, the controlling question here is whether this suit may be maintained by a taxpayer against the people of the State of Michigan without the express consent of the State to be sued, for the purpose of compelling the State to account to and pay the city of Ann Arbor for moneys expended by the city for police and fire protection and other services rendered by the city to the board of regents of the university. The answer is "No." *Cunningham* v. *Macon & Brunswick R. Co.,* 109 U.S. 446 (3 Sup. Ct. 292, 609, 27 L. Ed. 992); *Hans* v. *Louisiana,* 134 U. S. 1 (10 Sup. Ct. 504, 33 L. Ed. 842); *United States* v. *Sherwood,* 312 U.S. 584 (61 Sup. Ct. 767, 85 L. Ed. 1058); *McDowell* v. *Warden of Michigan Reformatory at Ionia,* 169 Mich. 322; *Missouri Tie & Lumber Co.* v. *Sullivan,* 275 Mich. 26; *Manion* v. *State Highway Commissioner,* 303 Mich. 1; *Mead* v. *Michigan Public Service Commission,* 303 Mich. 168; *McNair* v. *State Highway Department,* 305 Mich. 181.

The order of the circuit court setting aside the service of process on the governor and the attorney general and dismissing the bill of complaint as against the people of the State of Michigan as defendant is affirmed.

As to the board of regents of the university of Michigan is defendant, it is obvious that a money judgment cannot in this suit be lawfully entered against said defendant; and, if so entered, could not be enforced. It is equally obvious that if such relief were sought by writ of mandamus, such writ cannot issue in a chancery court and,

furthermore, no circuit court has jurisdiction to issue a writ of mandamus against State officers such as the regents of the university. 3 Comp. Laws 1929, § 15186 (Stat. Ann. § 27.2230). The Michigan Constitution (1908), art. 11 § 5, provides that the board of regents shall have general supervision of the university and direction and control of all expenditures from the university funds. Appellant places much reliance on Act No. 98, § 1, Pub. Acts 1929 (1 Comp. Laws 1929, § 441), as amended by Act No. 214, Pub. Acts 1937 (Comp. Laws Supp. 1940, § 441, Stat. Ann. 1947 Cum. Supp. § 4.191). However, this act is not mandatory but permissive only and merely authorizes the State administrative board, the board of regents of the university and other public agencies to contract for the furnishing of sewage and garbage disposal facilities, lights, water, fire protection, and other public facilities. The act does not form any basis for a decree to compel the board of regents to enter into such contracts.

The lands, buildings and equipment under the management, supervision and control of the board of regents of the university are public property, owned by the State of Michigan. Such public property belonging to the State is exempt from property tax. 1 Comp. Laws 1929, § 3395, as last amended by Act No. 24, Pub. Acts 1946 (1st Ex. Sess.) (Stat. Ann. 1947 Cum. Supp. § 7.7). *Auditor General* v. *Regents of the University of Michigan,* 83 Mich. 467 (10 L. R. A. 376); *City of Detroit* v. *George,* 214 Mich. 665; *People, for use of Regents of the University of Michigan,* v. *Brooks,* 224 Mich. 45; *James A. Welch Co., Inc.,* v. *State Land Office Board,* 295 Mich. 85.

Appellant points to the Constitution (1908), art. 11, § 10, which provides that "the legislature shall maintain the university," and from this argues that the court in chancery should compel the board of regents to account to the city of Ann Arbor for moneys expended by the city for police and fire protection and other services provided by the city for the university property; or *a fortiori* that the city should be compelled to levy a tax on the State property under the control of the board of regents to provide for such services. Appellant's argument that the legislature is not properly maintaining the university, perhaps might be addressed to the legislature. However, we do not conceive that it is within the province of the court in chancery to compel such action. As well stated by the trial judge, the arm of the chancellor may be long, but it is not that long.

Appellant devotes much time to argument that the statutes which exempt State-owned property under the control of the board of regents are unconstitutional. However, appellant does not point to any provision in either the United States Constitution or the Michigan Constitution (1908) which imposes any limitation upon the

power of the State legislature to exempt property from taxation. The tax-levying authority of the State is vested in the legislature, and this necessarily includes the power to exempt property from taxation. *Auditor General* v. *MacKinnon Boiler & Machine Co.*, 199 Mich. 489; *Harsha* v. *City of Detroit,* 261 Mich. 586 (90 A. L. R. 853).

The court has no power to compel the city of Ann Arbor to levy a tax upon State property within the control of the board of regents which the legislature has declared exempt from property taxation. The legislative classification of property into exempt and nonexempt categories does not in itself necessarily offend the due process* or equal protection† clauses of either the State or Federal Constitutions. 26 R. C. L. p. 253, 254, §§ 224, 225; *Union Steam Pump Sales Co.* v. *Secretary of State,* 216 Mich. 261; *Banner Laundering Co.* v. *State Board of Tax Administration,* 297 Mich. 419.

It is not for the court to consider the propriety of a contract between the city of Ann Arbor and the board of regents for the city to furnish police or fire protection or other public facilities for State property within the corporate limits. Nor is the city of Ann Arbor here before us seeking affirmative relief against the people of the State of Michigan or the board of regents. The plaintiff herein does not represent the municipality. The levying of municipal taxes is a matter of municipal prerogative and concern to be exercised by the proper authorities of the city of Ann Arbor. The court in chancery cannot substitute its judgment for that of the proper municipal authorities, or the board of regents, as to whether taxes should be levied or contracts entered into to provide for the furnishing of police facilities by the city. We are unable to conclude from the facts and circumstances alleged in appellant's bill of complaint that either the appellant or the taxpayers of the city of Ann Arbor are being deprived of property without due process of law. The relief sought by appellant does not come within the jurisdiction of a court of chancery, at least in so far as such relief is sought against the people of the State of Michigan or the board of regents of the university. Any issues between the plaintiff and the city of Ann Arbor are still pending in the circuit court and are not here for decision.

The order dismissing the bill of complaint as to said defendants is affirmed and the cases remanded. No costs, questions of public interest being involved.

BUSHNELL, C. J., and SHARPE, REID, NORTH, BUTZEL, and CARR, JJ., concurred. DETHMERS, J., did not sit.

*See U.S. Const. am. 14; Mich. Const. 1908, art. 2, § 16.–REPORTER.
†See U.S. Const. am. 14; Mich. Const. 1908, art. 2, § 1.–REPORTER.

3. AGREEMENT FOR THE FURNISHING OF POLICE AND FIRE PROTECTION SERVICES

AGREEMENT made this 15th day of October, 1964, by and between The Regents of the University of Michigan, a Michigan constitutional corporation of Ann Arbor, Michigan, (hereinafter referred to as the University) and the City of Ann Arbor, Michigan, (hereinafter referred to as the City).

WITNESSETH:

WHEREAS, under date of March 14, 1947, the parties hereto entered into an agreement pursuant to the provisions of Act No. 98 of the Public Acts of Michigan of 1929, as amended, which agreement among other things provided a formula for determining the amount that the University would pay to the City for the police protection rendered by the City to the University; and

WHEREAS, under date of July 31, 1956, the parties hereto entered into a similar agreement providing for furnishing of fire protection by the City and payment therefor by the University; and

WHEREAS, the parties desire to provide for the furnishing of such police and fire protection and the payment therefor in a single agreement;

NOW, THEREFORE, it is agreed by and between the parties hereto as follows:

1. In consideration of the police and fire protection services to be furnished by the City, the University shall pay to the City:
   a) An amount equal to 18% of the City's Police Department budget annually, plus related employee benefits;
   b) An amount equal to 18% of the City's Fire Department budget annually, plus related employee benefits.
2. The payments provided in Paragraph 1, a), and b) above are to be made quarterly in advance for each fiscal year beginning July 1, 1964, on the basis of the estimated budgets and adjusted at the end of each fiscal year on the basis of actual expenditures.

3. In determining the amount payable by the University under this contract, there will be deducted from the Police Department budget (and the actual expenditures) the amount which the University pays to the City under a separate contract for policing the University parking regulations. Any amounts collected by the City from others for police or fire protection services as such shall be credited to the University in determining the actual expenditures for the year-end adjustment of charges.
4. The amounts provided herein shall constitute complete payment for all services furnished to the University by the City Police and Fire Department; except the services for enforcing parking regulations provided under separate contract. This paragraph shall not be interpreted as preventing the City from collecting for special police services furnished during varsity football games under agreement with the Board in Control of Intercollegiate Athletics of the University.
5. This agreement supersedes, as of July 1, 1964, all provisions of the aforesaid agreement dated July 31, 1956, relative to fire protection services and all provisions relating to the furnishing of police services or the payment therefor of the aforesaid agreement of March 14, 1947.

4. OPINIONS OF ATTORNEY GENERAL

The freedom of the University from local zoning restrictions has been the subject of several opinions. In 1929, the Attorney General ruled that the University of Michigan was exempt from the provisions of the Ann Arbor Building Code.[1] In 1943, the Attorney General issued a broader opinion which ruled that no city or county could control the construction of buildings by any state institution within its boundaries.[2] In 1954, however, the Attorney General refused to rule as to whether either the State Plumbing Board or the City of Ann Arbor could set plumbing standards for the University of Michigan. The University was following the Ann Arbor standards at that time; so the question was entirely hypothetical.[3]

Rulings of the Attorney General have also dealt with the problem of tax exemptions. An illustration of the technicalities of the exemption of the property of private educational institutions as contrasted to the broad exemption of state institutions established in *Aplin*[4] are rulings made in 1928 concerning certain properties of Olivet College. The Attorney General ruled that the college president's house and a vacant lot owned by the college and occasionally used for athletics were not taxable, but a college-owned house occupied by the college secretary was subject to taxes.[5]

Dormitories financed under the "self-liquidating plan,"[6] in which the bondholders had an interest, raised questions as to tax exemption in 1928. The Attorney General decided that the dormitories remained nontaxable because the bondholders' interest pertained to a leasehold, and leaseholds are not taxable as such.[7]

In another opinion, the Regents were instructed in 1932 that they were not liable for real estate taxes; and a failure to notify the assessor of a change in ownership would not subject University property to taxes.[8] In 1940, following the *MacKinnon*[9] case, the Attorney General ruled that the University must pay drainage district taxes on lands not then being used by the University.[10] In 1942 he ruled that the property of the separately incorporated Michigan Union and Lawyers Club was exempt from taxation because these two corporations were merely the instrumentalities of the Board of Regents.[11]

FOOTNOTES

Section 1 - Introduction

1. The decisions mentioned appear after this Introduction.
2. Act. 98, P.A. Mich. 1929, as amended.

Section 4 - Opinions of Attorney General

1. 1928-30 Mich. Op. Att'y. Gen. 596.
2. 1943-44 Mich. Op. Att'y. Gen. 493.
3. Unpublished opinion dated December 31, 1954.

4. *Supra* p. 252.
5. 1896 Mich. Op. Att'y. Gen. 112; 1926-28 Mich. Op. Att'y. Gen. 714.
6. *Infra* p. 288.
7. 1928-30 Mich. Op. Att'y. Gen. 70.
8. 1930-32 Mich. Op. Att'y. Gen. 429.
9. *Supra* p. 255.
10. Unpublished opinion dated June 11, 1940. No. 16209.
11. Unpublished opinion dated December 1, 1942, No. 24965.

Part Three

The Internal Government of the University

CHAPTER IX

UNIVERSITY PROPERTY AND BUSINESS CONTRACTS

1. INTRODUCTION

The authority of the University to engage in business operations which are connected with any large institution has not often been challenged. Whenever it has been brought to the attention of the courts, the constitutional status now enjoyed by all the state universities in Michigan has been decisive. In the instance of the Detroit Young Men's Society[1] it was held that no enabling act of the legislature was needed by the Board of Regents to convey land belonging to the University of Michigan. Since Michigan State University seems to have engaged in more peripheral activities, its actions have more often been challenged as "ultra vires." These cases, which are included in Chapter III, all resulted in the vindication of the University.

Two cases included in this chapter involve the right of the University to sue and to be sued on business contracts. In the *Pray* case, the University as the holder of bonds of a drainage district sued the County of Washtenaw for payment. In the *Seldon Breck* case, the construction company sued the University under a contract to erect the general library. In both cases, the University is treated by the courts as an ordinary litigant—it is to be subject to suit in the same courts and under the same courts and under the same law as a private corporation. In fact, the federal judge in the *Selden Breck* case characterizes the case as a regular diversity-of-citizenship action, a Missouri corporation suing a Michigan corporation.

The implicit holding in these cases that the University is subject to suit like any private corporation may have been overruled by the tort cases and the Court of Claims statute. It is now almost settled law that the University is subject to suit only in the Court of Claims for personal injuries inflicted by its employees on others.[2] The Court of Claims statute, however, invests

exclusive jurisdiction in that court of all claims "ex contractu and ex delicto."[3]

2. JUDICIAL DECISIONS

The Regents of the University of Michigan v. The Detroit Young Men's Society

12 Mich. 138, 159-68 (1863)

[In this case the Regents are suing the Society because it has not paid money due under a contract to sell land. In defense, one of the arguments raised by the Society is that the contract is void because the Regents have no power to convey land belonging to the University.]

CHRISTIANCY, J. * * *

The only remaining question is that of the power of the regents to sell this property. This question might depend upon the mode and purposes of the acquisition—the objects and terms expressed in the instrument by which the title was acquired. And as the regents have been held to be the successors of the trustees of the university under its old organization—who had an express power of sale vested in them—and the powers and functions of the present organization are different in many other respects, the question might perhaps be affected by the fact when and by which organization the property was acquired. But so far as the question of the power of the regents to sell may depend upon any of these considerations, it can *not be definitely decided upon the present record, [160] as the time when the title was acquired does not appear, nor the mode or purpose of its acquisition. No *particular* title is set forth, nor was this necessary. The allegation is general, that the plaintiffs, on the third day of August, eighteen hundred and fifty-eight, "being the owners" of the premises, and the defendant wishing to purchase, the said plaintiffs and defendant entered into the contract. This allegation, being mere inducement, was sufficient, and it is broad enough to admit proof of any legal title or ownership under which a right of sale could exist. The particular title would be matter of proof only. The title of the plaintiffs is therefore well pleaded, if they were competent in law to take or hold a title which would

enable them to sell. If, therefore, as a legal possibility, there could have been, at the time alleged, such a title in the plaintiffs as would give them the power of sale, the judgment upon the demurrer must be for the plaintiffs, however they might have failed upon the trial to establish such title by proof.

The abstract question, therefore, of the legal possibility of such ownership by the plaintiffs, is the only question upon this branch of the cause which can be decided upon this demurrer. Upon this question I think there can be little room for doubt. This being an action at law, any conveyance, by grant or devise, vesting in them the whole legal title, though it were upon special trusts, would satisfy the allegation of ownership contained in the declaration, if it conferred the power of sale, as well as if no trust had been declared. The power of taking and holding real estate—as well as personal property—is generally laid down as one of the powers incident to every corporation, unless there be an express prohibition, or such power be clearly repugnant to the purposes of its creation, or forbidden by some positive law: *A. & A. on Corp.*, §§ *110, 111; 2 Kent,*
[161] *224.* And the power to convey, except *where its acquisition is for some special purpose, not shown here, and inconsistent with the power of sale, is a correlative of the right to acquire: *A. & A. on Corp., ut supra.* And see *Ibid.*, §§ *187 to 192.* We have no statute of mortmain which can affect the question. And the power of this corporation to take, hold, and convey real estate, for any purpose clearly tending to promote the interest of the university, to increase its funds, or otherwise to further the great public objects for which the corporation was created, can not, I think, admit of a reasonable doubt. The right to take and hold property, such at least as the university grounds and buildings, library and apparatus, and to transmit or continue its ownership by corporate succession, was doubtless one of the main objects of the incorporation in its present form; yet no express power of this kind is to be found in the act of incorporation. And though it is clear that they can exercise no power over the land granted by congress to the state for the support of a university, nor over the principal of the university fund, the disposition of both of which the legislature has placed in other hands, yet if some benevolent individual, desirous of promoting the public interest, should have conveyed this or any other land to these regents in their corporate capacity, vesting in them the whole legal title, for the express purpose and upon the express trust, that they should sell and convey the land in such manner and on such terms as they should deem best for the interest of the institutions, and place the proceeds in the state treasury to the credit of the university fund, or expend them for the increase of the library, or the chemical

or philosophical apparatus, I can see no possible ground to doubt their power to take and hold the property, or to accept and execute the trust by a sale of the land for such purpose. See *Vidal v. Girard's Executors, 2 How., 190; Executors of McDonough v. Murdock, *15 How., 367; Perrin v. Carey (McMickin's will), 24* [162] *How., 465.*

Many other cases might be put in which their power of sale would be equally clear. But it is unnecessary to multiply instances, since a title like that above supposed would be admissible under the allegation of ownership contained in this declaration.

But it is said we can not presume a trust, as none is mentioned in the contract. It is sufficient to say that, if such trust existed, it was unnecessary to mention it in the contract, or in the declaration. It would be sufficient if the title, when produced in evidence, disclosed a trust which would sustain the power of sale. There is no occasion for any presumption. It is not a question for presumption, but what evidence would be admissible under the allegation; and we are certainly not at liberty to indulge any presumption against the truth of the allegation of ownership, which is broad enough to include such title in trust. What right, on the other hand, have the court to presume that this is a part of the land conveyed to the state for the use of the university? Or that, though conveyed to the regents, the conveyance was such as to deprive them of the power of sale, when it may have been so granted as to give them that power? Can we deny them the right to prove their allegation? It is not for the court, upon demurrer, more than for the opposite party, to deny the truth of the allegation demurred to. The question is not upon its truth, but its sufficiency. Its truth is admitted by the demurrer, unless legally impossible.

It was stated on the argument that the lot mentioned in the contract was conveyed, in the year 1825, by the governor and judges of the territory of Michigan, to the "trustees of the university of Michigan" as organized under the act of 1821, for the use of the university;

and we are referred to the decision in *The Regents of the* [163] *University v. The Board of Education of Detroit, 4 *Mich., 214,* holding the regents under the present organization to be the successors of said trustees, or, rather, a continuation of the same corporation. But to enable us to decide upon demurrer the power of the present corporation to sell lands thus conveyed, the fact, date, and nature of the conveyance, should appear upon the pleadings. It is not desirable, if it were competent, to decide a case of this magnitude, hypothetically, further than we may be compelled to do by the nature of the question. The question of the power of the plaintiffs to convey, under the supposed deed from the governor

and judges, is in no way necessary to the decision of the cause, and is not involved in it; since, if this were decided against the plaintiffs, the decision upon this demurrer must still be in their favor. It will be time enough to decide this question when it is presented by the pleadings, or upon objections taken to the proof which may be offered.

The judgment of the court below must be reversed, with costs to the plaintiffs in both courts. And the defendant must have leave to plead to the declaration.

MARTIN CH. J. concurred.

MANNING J.:

The university of Michigan is a public corporation. The people, in their political capacity, are the corporators. It is a part of the educational system of the state, and is under the control of the legislature, except so far as it has been placed beyond the reach of that body by the constitution, and the trust attached to the university fund. In all other respects it is subject to state legislation, and may be molded from time to time to suit the actual or supposed wants of the public. The corporation of to-day is the corporation known as the university of Michigan, under "an act for the establishment of a university," approved April 30, 1821: *Laws of Michigan, *1827, p. 445.* And the corporation under this last men- [164]
tioned act was the corporation created by the governor and judges of the territory of Michigan, on the 26th August, 1817, by an act entitled "An act to establish the catholepistemiad, or university of Michigan," if an organization in fact ever took place under this last mentioned act. See *Regents of the University of Michigan v. The Board of Education of the City of Detroit, 4 Mich., 213.* The present corporation has been made to differ from what it was under the two last mentioned acts by the legislation and constitution of the state. It was a public corporation originally, and has been throughout. It was created to subserve a great public want—the education of the people. For while freedom is the corner-stone of our political fabric, intelligence is the cement that holds it several parts together.

The act of April 30th, 1821, gave to the trustees of the university the control of both the property and government of the institution. They were declared capable of holding property, real and personal, and of buying and selling, and otherwise lawfully disposing of it, with certain restrictions imposed on the disposition of property mentioned in the seventh and eighth sections of the act. Under the state government a different policy was inaugurated. The government

of the institution and the control of its property were separated from each other, and no longer trusted to the same hands.

The former was given to the regents, who took the place of trustees under the territorial organization, while the latter was retained by the state, intrusted by law to the superintendent of public instruction.

This office was created by the constitution of 1835. And by "An act to provide for the disposition of the university and primary school lands, and for other purposes," approved March 20th, 1837,

[165] the superintendent of public instruction was to have the care and disposition of *all lands and other property reserved and granted to the state for purposes of education: *S. L. 1837, p. 209,* § *1.* He was to sell the university and school lands, and loan the money, the interest on which was to be paid to the state treasurer, and by him to be passed to the credit of the university or school fund as the case might be: §§ 16, 19. He was to submit to the legislature an annual report, exhibiting the condition of the university and primary school fund; to apply the income of the university fund to the payment of such debts as should accrue from the operation of the law establishing the university; and to prepare annually a table of the amount payable to the university, and also the amount of the aggregate payable to the several counties, and present the same to the auditor-general, who was thereupon to issue his warrant on the treasurer of the state for the amount payable to the university, and to the several counties: § 18. And it was made the duty of the state treasurer to pay such warrant to the treasurer of the university, or of the county, as the case might be: § 19. And by "An act to provide for the organization and government of the university of Michigan," passed at the same session, the university was organized. See *Laws of 1837,* p. 102. This act does not, in express terms, repeal the act of 1821, and yet as it and the act already mentioned cover the ground covered by the act of 1821, and are inconsistent with the latter act, it must be regarded as repealed by implication. It is not necessary for our present purpose to point out the differences between the two acts, any further than to say, that the act of 1837, unlike the act of 1821, does not give the regents power to sell, or otherwise dispose of the property of the university. It states the object of the university to be, to provide the inhabitants of the state with the means of acquiring a thorough knowledge of the various branches of

[166] literature, science and the arts, and vests its government in a board *of regents, and declares them a body corporate, with the right of suing and being sued, and prescribes their powers, and makes it their duty, as soon as the state shall provide funds for that purpose, to erect the necessary buildings for the university,

on grounds to be designated by the legislature, and in such manner as shall be prescribed by law. No mention whatever is made of the care and disposition of the property of the institution, for the reason that that had been placed under control of the superintendent of public instruction.

Changes have been made from time to time, but none showing an intention on the part of the legislature to give to the board of regents power to dispose of the property of the institution.

By our present constitution, "The proceeds from the sales of all lands that have been or hereafter may be granted by the United States to the state, for educational purposes, and the proceeds of all lands or other property given by individuals, or appropriated by the state for like purposes, shall be and remain a perpetual fund, the interest and income of which only is to be expended:" *Art. XIII, § 2.* And by § 8 of the same article it is provided, "The board of regents shall have the general supervision of the university, and the direction and control of all expenditures from the university interest fund."

Here is a constitutional provision giving the regents control of the interest of the university fund, but not of the fund itself. Why this constitutional provision if it was intended the regents should have the control and disposition of the property of the university, as the trustees had under the act of 1821? If it be said, these lands were deeded to the university, and therefore do not come within the description of lands which the commissioner of the state land office is authorized to sell—that officer, instead of the superintendent of public instruction, now having the sale of the university and school lands—the reply is, *the legislature can give him the [167] power. It is no reason for giving by implication powers which it is clear the legislature never intended to give. The property the board of regents have contracted to sell amounts to $21,000. What power have they to invest the money? On what security, and to whom, and at what rate of interest is it to be loaned, and who is to collect and account for the interest, and to whom? We can hardly suppose the act would be silent on all these subjects if there was an intention on the part of the legislature to give the power claimed. And I can see no reason for dividing the university fund into two parts, and placing one in charge of the state, and the other of the board of regents.

I would stop here, but for a suggestion that has been started on which I will say a few words.

It has been suggested whether the land contracted to be sold may not be held by the corporation in trust, with power to sell the same. If we suppose such to be the case, I do not see that it removes the difficulty I have stated—the want of power in the board of regents to convey. I do not understand that the functions of a

corporation can be enlarged by a deed of trust; that is, that a trust can be made the means of communicating new faculties to a body corporate. The admission of such a principle would enable a corporation, after parturition, to be metamorphosed into quite a different being; so much so as hardly to be recognized, if not seemingly to lose its identity. An insurance company might be changed into a bank, and a bank into an insurance company. When a corporation is made a trustee, the execution of the trust must come within the faculties of the corporation, or the trust must go unexecuted until a competent trustee is appointed. If we are correct in these views, the error in supposing the facts suggested would help the plaintiff, lies in taking it for granted that the power of the corporation to
[168] convey is in the board of regents instead of the state. *It must be borne in mind that this is a public corporation, created for governmental purposes; that the people of the state in their political capacity are the corporators; and that in creating the corporation they reserved to themselves, through the legislature, the power of disposing of the property of the corporation instead of giving it to the regents.

If it be said the suggestion may be carried a step further, and take it for granted that by the trust-deed power to sell is given to the board of regents, and not to the corporation, it does not extricate us from the dilemma. If the trust is to the regents of the university of Michigan, that being the corporate name, it is to the corporation, and not to the persons composing the board of regents, as individuals. If it is to them as individuals, they must execute it in their individual capacity, and not in the name of the corporation. The contract is in the name of the corporation. And the power of the corporation to convey, as I have attempted to show, is not in the board of regents, but in the corporators, the people in their legislative capacity; in other words, in the state.

For these reasons, without noticing the other questions made on the argument, I think the judgment of the court below should be affirmed, with costs.

CAMPBELL, J. did not sit in this case.

Judgment reversed.

Regents of The University of Michigan v. Pray

264 Mich. 693, 695-703; 251 N.W. 348 (1933)

NORTH, J. This is a mandamus proceeding by which plaintiff seeks to compel payment of drain bonds from general funds of Washtenaw county, relying particularly upon that portion of 1 Comp. Laws 1929, § 4937, which reads:

"In case the amount available in the drain fund shall be insufficient to pay the principal or interest of any such bonds heretofore or hereafter issued when they become due the same shall be advanced and paid by the county out of its general funds and reimbursement to said general fund shall be made out of the drain taxes thereafter collected."

After hearing in the circuit court, the writ of mandamus issued against the defendant county officials. Leave having first been obtained, they have appealed.

Incident to the construction of the Darlington subdivision drain in Washtenaw county, bonds aggregating $31,500 were issued March 1, 1927. Provision for issuing such bonds is contained in Act No. 316, Pub. Acts 1923, as amended by Act No. 365, Pub. Acts 1925. These statutory provisions are now embodied in the "Drain Code," 1 Comp. Laws 1929, § 4838 *et seq.* Plaintiff purchased 20 of these drain bonds, each in the amount of $1,000. Two of the bonds having matured April 1, 1932, were presented for payment, which was refused. Also plaintiff was refused payment of accrued interest due April 1, 1932. There was practically no money in the Darlington subdivision drain fund. This condition seems to have resulted largely, if not wholly, from delinquency in payment of assessments incident to the construction of this drain. From taxes collected the county treasurer had on hand approximately $25,000, which, when properly entered on his books, constituted a part of the county's general fund. But the record sustains defendants' claim that, notwithstanding such money in the general fund, there would be a deficit in this fund resulting from the ordinary operating expenses of the county at the end of the current fiscal year. The board of supervisors did not authorize a transfer of any money from the general fund to the Darlington subdivision drain fund, and no appropriation was made to cover any deficiency in such drainage fund. Notwithstanding the facts above recited, plaintiff asserts its right to have payment made to it from the county's general fund.

Defendants have challenged the constitutionality of the act under which plaintiff asserts right of payment. In part unconstitutionality is asserted on the ground that the title to the drain code is not sufficient to cover the amendments embodied therein, which provide for issuing drainage bonds and contingent payment thereof from the county's general funds. Prior to the 1929 amendment the title read:

"An act to codify and add to the laws relating to the laying out of drainage districts, the construction and maintenance of drains, the assessment and collection of taxes therefor; to prescribe penalties for violations of certain provisions of this act; and to repeal certain acts relating to drains."

While, as pointed out by appellants, the title does not refer to the issuing of drain bonds, nonetheless we think that provision therefor in a drain law is clearly and necessarily germane to the general provisions of the act having to do with "the construction and maintenance of drains, the assessment and collection of taxes therefor." In 1917 the State Constitution was amended (article 8, § 15a), and express provision embodied therein for issuance of bonds for drainage purposes by drainage districts. In 1923 the legislature codified the drain law of this State and therein provided the manner and conditions for the issuing of drainage district bonds. Act No. 316, Pub. Acts 1923. The title adopted in 1923 remained unchanged and as above quoted until 1929. See Act No. 318, Pub. Acts 1929. Being a codification, the statute necessarily embodied various and somewhat diversified provisions of the drain law. But as against objections here raised, we do not find that the act violates article 5, § 21, of the Constitution, in that it embraces more than one object or because the title is deficient in that it is not sufficiently broad to cover the provisions of the act. Title to a codification statute can scarcely be expected to embody reference to every detail of the act. Such is not the constitutional requirement. If the title fairly apprises legislators and the public generally of the purposes of the act as a whole, such title is sufficient. *Vernon* v. *Secretary of State,* 179 Mich. 157 (Ann. Cas. 1915 D, 128). If the title is adequate, and the statute contains only that which is germane to its general purposes, it does not offend article 5, § 21, of the State Constitution which provides: "No law shall embrace more than one object, which shall be expressed in its title." The title specifically refers to the "construction" of drains. Construction necessarily involves provision for payment of cost; and issuing bonds is a commonplace method (possibly too commonplace) for financing the cost of public improvements. Provision for issuing

bonds is only incidental to the main general purpose of the drainage act, and reference to the title to such provision is not necessary.

"The requirements of the Constitution, article 5, § 21, that no law shall embrace more than one object, which shall be expressed in its title, are met if an act centers to one main general object or purpose which the title comprehensively declares, though in general terms, and if the provisions in the body of the act not directly mentioned in the title are germane, auxiliary, or incidental to that general purpose." *Loomis* v. *Rogers* (syllabus), 197 Mich. 265.

See also, *People* v. *Stimer,* 248 Mich. 272 (67 A. L. R. 552).

Substantially the same may be said of the portion of statute embodied in Act No. 331, Pub. Acts 1927 (above quoted [see 1 Comp. Laws 1929, § 4937]), wherein it is provided in case bonds mature or interest is payable and the drain fund is insufficient to meet the obligation "the same shall be advanced and paid by the county out of its general funds and reimbursement to said general fund shall be made out of the drain taxes thereafter collected." Clearly this provision has to do with the marketability of drain bonds. It has an important bearing upon the matter of obtaining funds with which to pay for construction, and is germane to the main purpose of the act. This provision of the drain code is not materially unlike another and earlier provision in the drain law (Comp. Laws Supp. 1922, § 4922 [Act No. 64, Pub. Acts 1921]), which reads:

"Provided, further, That the holder of such (drain) order may, if he so desires, have the right to require payment thereof out of any moneys in the general fund of the county treasury that may be available, if the drain fund is insufficient for such purpose because of delinquency in the payment of drain taxes."

As against the objection now under consideration, the title was held to cover the above-quoted amendment to the drain law. *Moore* v. *Harrison,* 224 Mich. 512. The title is sufficient as against the objections here urged. See *Vernon* v. *Secretary of State, supra.*

The amendment to the act wherein provision is made for payment from general county funds (Act No. 331, Pub. Acts 1927) became effective subsequent to plaintiff's purchase of the bonds involved in this case. Appellants urge that this amendment is not effective as to these bonds except it be construed as an *ex post facto* law and therefore unconstitutional. We think this contention is without merit and is fully answered in *Moore* v. *Harrison, supra.* Appellants' position is not tenable.

Defendants' answer denies the authority of the drain commissioner to issue the bonds; denies the duty or obligation to pay the bonds presented on the grounds of lack of money in the Darlington subdivision drain fund; asserts that the county has no right to levy a tax upon the county at large for the purpose of paying these drain bonds; and asserts that the condition of the general fund is such that the payment of the drain bonds would impair operation of necessary county governmental functions; and that, under the circumstances, there is no legal obligation upon the county as such to pay the bonds of the drainage district, the supervisors not having authorized a transfer of money from the general fund to the drainage district fund.

The statutory provision expressly authorizes and empowers the drain commissioner to issue drainage bonds. Appellants' contention that since a county is not authorized to construct a drain "at the expense of the county," it follows that a drain commissioner acting for and in behalf of a drain district in issuing bonds cannot obligate the county for the payment of the bonds, cannot be sustained. The county does not pay or become obligated to pay these bonds except in the event that the drain fund is inadequate to meet the obligation of matured bonds or accrued interest; and in that event the statute provides only that the same shall be advanced and paid by the county out of its general fund and reimbursement to said general fund shall be made out of the drain taxes thereafter collected. Regardless of the temporary advancement by the county, in the end payment is by the drainage district. If the first assessments are inadequate, there is express statutory provision for an additional assessment upon the drainage district. 1 Comp. Laws 1929, § 4940. In passing upon the earlier provision of the drain law relative to drain orders being paid from the county's general fund, this court said, as might well be here said:

"There was no purpose to impose a tax on the county at large to aid in the construction of a particular drain. Under the proceedings taken, the lands specially assessed would be benefited to the amount of the assessment. There was no presumption that they would be abandoned by the owners by reason thereof. The intent as evidenced by the language of the act, considered in the light of its other provisions, was simply to require the county to advance out of its general fund sufficient sums to retire any orders then unpaid, reimbursing itself when the lands delinquent were either redeemed or sold. The legislature had already imposed certain expenses on the county, presumably in its interest, and for which it would receive benefit. In imposing this additional burden, we do not think it exceeded its power." *Moore* v. *Harrison, supra,* 517.

On this phase of the case appellants, to some extent, rely upon the decision in *Spiegel* v. *Barrett,* 189 Mich. 111. Obviously the cited case is not at all applicable, because at that time there was no statutory provisions for paying the amount due on drain orders or drain bonds from the general county fund.

There still remains to be considered appellants' contention that because there was not sufficient money in the general county funds to cover the expenses of the county's governmental activities for the current year, refusal to pay these drain bonds from such general fund was justified. The opinion of the trial judge disposes of this phase of the case in the following language:

"Can the issuance of bonds by the drainage commissioner on behalf of the drainage district impair or jeopardize the necessary functions of government?

"In this connection our attention has been directed to the case of *Bay City Dredge Works* v. *Fox,* 245 Mich. 523. This latter case was mandamus to compel the county clerk and county treasurer to pay certain drain orders. Plaintiff there held certain drain orders and the drain fund being deficient demanded a payment out of moneys in the general fund in the county treasury, basing right thereto under Act No. 316, Pub. Acts 1923, as amended by Act No. 365, Pub. Acts 1925, and reading as follows:

" 'The holder of such order may, if he so desires, have the right to require payment thereof out of any moneys in the general fund of the county treasury that may be available.'

"The opinion was by a divided court, but the controlling opinion written by Mr. Justice WIEST held that the statute placed a limitation upon the right to have payment and contemplated that there might be moneys in the treasury not to be used for the payment of drainage orders, for it confines payment out of funds usable for such purposes.

"It was held that the term 'available' is employed in the statute in the sense of 'usable,' and that the statute did not grant plaintiff right to recourse to any and all moneys in the treasury, but limits resort to such only as are available for the payment of drain orders. Further, that the moneys in the treasury raised by taxation to meet ordinary current county expenses and needed for such purpose are set apart to such use and are not usable to pay drain orders.

"The *Bay City Dredge Case,* in my opinion, merely interpreted the statute there in question and with particular reference to the language therein contained. I am of the opinion that such reasoning

was not intended to control the present situation. Here that portion of the statute under discussion is mandatory. It expresses the clear legislative intent that when the amount available in the drain fund shall be insufficient to pay the principal or interest of any drainage bonds heretofore or hereafter issued when they become due, the same shall be advanced and paid by the county out of its general funds.

"The statute does not include the word 'available,' which under Justice WIEST's opinion would be regarded as usable for the purpose. It simply states that bondholders shall be paid out of the general fund and that reimbursement shall be made. The wording does not indicate that the legislature intended that the probability or possibility of reimbursement should be determined prior to any payment for the purposes mentioned out of the general fund. * * *

"It is my further opinion that, under the case of *Moore* v. *Harrison,* 224 Mich. 512, and the later case of *Township of Waterford* v. *Willson,* 257 Mich. 619, that the question of the depletion of the county funds does not enter into the discussion, in view of the statute, which is here upheld, and which provides for no exceptions or limitations upon the use of funds to all practical intents and purposes included in the general fund for the purpose stated."

Both on the date of instituting suit and on the date of hearing, there was in the Washtenaw county general fund money greatly in excess of the amount of the payment sought by plaintiff. Mandamus was the proper remedy, because plaintiff is clearly entitled to payment, and likewise the duty of respondents as public officers to make such payment out of moneys in the county's general fund is clearly and specifically imposed by statute. The record presents a clear legal duty on the part of the defendants and a clear legal right on the part of the plaintiff to have such duty performed. *Taylor* v. *Isabella Circuit Judge,* 209 Mich. 97; *Miller* v. *City of Detroit,* 250 Mich. 633.

The judgment is affirmed, with costs to appellee.

McDONALD, C. J., and POTTER, SHARPE, FEAD, WIEST, and BUTZELL, JJ., concurred. CLARK, J., took no part in this decision.

Selden Breck Construction Co. v. Regents of the University of Michigan

The United States District Court for the Eastern District of Michigan, Southern Division, 274 Fed. 982, 983, 984-85, (1921)

TUTTLE, District Judge. This cause is now before the court on demurrer to the declaration.

The action is trespass on the case on promises, and was brought to recover damages alleged to have been sustained by the plaintiff, a Missouri corporation, by reason of a breach by the defendant, a Michigan corporation, of a certain contract entered into between the parties hereto, for the furnishing by the plaintiff of labor and material for the construction of a library building for the defendant to be erected upon the campus of the University of Michigan, at Ann Arbor, Mich., which is under the control of the defendant board of regents. The damages claimed by plaintiff, which exceed the necessary jurisdictional amount, are alleged to have been caused by delays to which the plaintiff was subjected in completing its work under the contract as a result of the failure of defendant to perform certain of its duties under such contract.

* * *

1. Section 46 of the General Conditions forming part of the contract provides as follows:

"The owner is not to be held responsible for any damage incurred by the contractor through the fault of any other contractor employed by the owner. Should the contractor be delayed in the prosecution of the work by reason of the above cause, or through the owner, the time of completion shall be extended for a period equivalent to the time lost, which period shall be determined by the architect, but no such allowance shall be made unless a claim therefor is presented in writing to the architect within forty-eight hours of the occurrence of such delay."

The contention of defendant that this provision limits and measures the extent of the rights and remedy of the plaintiff in the event of delay occasioned through the fault of the defendant and deprives the plaintiff of the right to recover damages caused through such delay cannot, in my opinion, be sustained. In the absence of an express stipulation relieving the defendant from liability for damages

caused by its breach of this contract, it would, of course, be liable therefor. The language of the provision thus invoked and relied upon by defendant as a basis for exemption from such liability certainly does not in terms provide for such exemption, and to have that effect a meaning must be read into it which is not expressed in the words used. There seems to be no ambiguity in this language. It merely provides that if the plaintiff be delayed through the fault of any other contractor employed by the defendant, or through the defendant, "the time of completion shall be extended for a period equivalent to the time lost." The "time of completion" is obviously the period of time referred to in the clause of the contract, copy of which is attached to the declaration, providing that the plaintiff "is to complete the entire work upon or before January 1, 1918." The purpose, then, of the condition invoked by defendant, is, manifestly, to relieve the plaintiff from the consequences of a failure on its part to complete its work by the date mentioned, if such failure be caused by the fault of the defendant, by allowing to the plaintiff an extension of the time of completion for a period of "equivalent to the time lost by reason of such fault of defendant." That this was intended to be an allowance to, and not a limitation upon the plaintiff, is further indicated by the concluding clause in this section providing that such an "allowance" will not "be made" unless a claim therefor is presented within the time therein specified.

Although some authority is cited apparently to the contrary, I am unable to accept the reasoning or agree with the conclusion involved in the theory of the defendant in support of this contention. I am satisfied that the provision in question, properly construed, was intended to, and does, create an exemption in favor of the plaintiff, and not of the defendant, and that to interpret it otherwise would be to import into it a meaning which the parties thereto have not themselves expressed. Nelson v. Pickwick Associated Co., 30 Ill. App. 333; W. H. Stubbings Co. v. World's Columbian Exposition Co., 110 Ill. App. 210; Del Genovese v. Third Avenue R. R. Co., 13 App. Div. 412, 43 N. Y. Supp. 8; Id., 162 N. Y. 614, 57 N. E. 1108.

[2] 2. It is further urged by defendant that the act of plaintiff in proceeding with, and completing, its work under the contract after the alleged breach thereof by defendant, operated as a waiver of any right to recover damages caused by such breach. I cannot agree with this contention. Consideration of the subject satisfies me that the correct rule is that upon breach of a building contract by the failure of the owner to perform his obligations under such contract, which delays the contractor in completing his work thereunder, the latter is not obliged to abandon such work, but may elect to continue therewith after such breach and, upon performance of the contract

on his part, is entitled to recover the damages sustained by him as a result of the delay caused by such owner. W. H. Stubbings Co. v. World's Columbian Exposition Co., supra; Allamon v. Albany, 43 Barn. (N. Y.) 33; Florence Oil & Refining Co. v. Reeves, 13 Colo. App. 95, 56 Pac. 674; 9 Corpus Juris, 793.

[3] 3. The claim by defendant that the acceptance by the plaintiff of an extension of the time within which it was bound by the contract to finish its work, and the completion by plaintiff of the building within the time so extended, operated to deprive the plaintiff of any right to recover damages resulting from the alleged breach by defendant, if such claim be intended to be separate from, and in addition to, the contentions already considered, is disposed of by the conclusions reached with respect to such contentions, as hereinbefore indicated. The considerations pointed out in that connection are equally applicable and controlling, in principle, here; from which it results that the demurrer must be overruled.

3. OPINIONS OF ATTORNEY GENERAL

Frequently the Attorney General has been requested to rule concerning particular business operations of the universities. Some of the important questions which have been answered in these opinions are as follows: whether enabling legislation is required for the acquisition or disposal of university lands; whether, and how, a state university may borrow money; and whether certain statutes and administrative regulations affecting the university are constitutionally valid. Also, the Attorney General repeatedly, has been called upon to interpret general statutes which do not specifically exempt the universities from their coverage.

The Attorney Generals' opinions relating to the authority of the Board of Regents to acquire and to dispose of University property go back to the year 1900. In that year, he ruled that the Auditor General had no authority to prevent the acquisition of land by the University of Michigan.[1] The year 1907 saw another ruling to the same effect.[2] Since then the various Attorneys General of Michigan have consistently reaffirmed the authority of the university boards, without enabling legislation, to acquire property in trust;[3] to dispose of trust property with the proceeds of the property being used according to the terms

of the trust;[4] and to convey university property to another state agency.[5]

The authority of the governing board to borrow or to lend money, however, has not been as clear as their authority to accept and to dispose of property. The state constitution closely restricts the amount of state indebtedness, and provides further that "the credit of the state shall not be granted to or in aid of any person, association, or corporation, public or private."[6] Although there are no cases interpreting these provisions of the state constitution as they apply to the universities, the settled opinion seems to be that, as a part of state government, a general debt payable out of state appropriations would be illegal as an unconstitutional state debt.[7]

In 1928 the Attorney General approved a device known as the "self-liquidating project" which has enabled the state universities to obtain money without violating the constitutional restrictions on state indebtedness.[8] The theory behind the self-liquidating project is that a university is not generally indebted at all. It merely agrees to use the income generated by the project itself to repay the bondholders. This device has been extensively used to finance new dormitories, but it has also been used to erect such diverse structures as football stadiums, student unions, and parking structures. The Attorney General has gone so far as to approve short-term indebtedness by Michigan State University secured by anticipated student fees.[9] And, when legislators enacted a statute forbidding the issuance of self-liquidating bonds without the approval of the state, the Attorney General ruled that the law was unconstitutional.[10]

It would appear that the Board of Regents of the University of Michigan currently has, as a body corporate, the power to finance the acquisition of truly self-liquidating facilities such as housing and dining facilities, student activities facilities, parking facilities and athletic facilities, by the issuance of obligations payable in future years without any legislative act, provided the facilities are reasonably proper and necessary for the University to function.

The restriction on extending the credit of the state to others has also been the subject of opinions of the Attorney General as it bears upon the financial operations of the state universities. In 1928, he ruled that a police and fire protection

agreement between the then Michigan State College and the City of East Lansing was illegal because it amounted to an extension of state credit by the college to a public corporation, the city.[11] For the same reason, Michigan State is prohibited from assisting its fraternities to build houses,[12] and from supplying water and sewer service to neighboring private persons.[13]

The construction and maintenance of university buildings, as well as their financing, has been treated in many opinions of the Attorney General. As early as 1898, the Attorney General ruled that construction of an addition to the Law School at the University of Michigan was not governed by a statute which, literally, would have applied to all state institutions.[14] In another opinion, the Attorney General reiterated the *Weinberg*[15] rule that the University need not require bonds from contractors for the benefit of subcontractors.[16] In another opinion interpreting the School Building Code, the Attorney General ruled that it applied only to classroom buildings.[17] A recent ruling in 1965 held unconstitutional a statute which purported to vest authority in the state administrative board over the construction programs at the ten autonomous colleges and universities of the state.[18]

Many other opinions cover some of the vast miscellany of legal questions which arise from particular business transactions of the University. The Attorney General's office has issued the following opinions. The Board of Regents may place fire insurance on University property without the approval of the Auditor General.[19] Alternately, with the consent of the state administrative board, the Regents may cover University property through the state fire insurance fund.[20] State laws for the registration and supervision of laboratories govern only those University laboratories which sell their products for a profit.[21] The University may serve oleomargerine despite a contrary statute.[22] Unclaimed checks issued by the University are subject to escheat except those in payment of wages.[23] Michigan State University may license the Dow Chemical Company to produce an insecticide which has been patented by that University.[24] A statute requiring state agencies to have all their printing done within the state does not apply to those universities with constitutional status.[25] The Michigan Higher Education Assistance Authority[26] is not authorized to charge a fee to the schools for its services in

guaranteeing up to 80% of a student loan.[27] Parking and traffic regulations for university property may be adopted by the university's governing board and enforced by a city in accordance with a contract between the board and the city.[28] The board of Michigan State University may delegate financial authority to the University president in spite of a conflicting statute which would have delegated such authority to the University's secretary.[29] An annuity plan adopted by a college in order to raise funds is not subject to regulation under the state insurance code.[30] Finally, although its name is one of a university's most valuable assets, the Attorney General ruled that only the legislature, and not the governing board, could change the name of Michigan State College to Michigan State University.[31]

FOOTNOTES

Section 1 - Introduction

1. The decisions mentioned appear after the Introduction.
2. See *supra, Fox, Glass & Branum* in Chapter VII.
3. See *supra* p. 248.

Section 3 - Opinions of Attorney General

1. 1901 Mich. Op. Att'y. Gen. 75.
2. 1907 Mich. Op. Att'y. Gen. 104.
3. 1930-32 Mich. Op. Att'y. Gen. 283.
4. Unpublished opinion, No. 14155, dated January 31, 1940.
5. 1926-28 Mich. Op. Att'y. Gen. 777.
6. Mich. Const. Art. 9 § § 14, 15, 18; Cf. Mich. Const. (1908) Art. 10, §§ 10, 12.
7. 1926-18 Mich. Op. Att'y. Gen. 541; 1913-14 Mich. Op. Att'y. Gen. 744.
8. 1928-30 Mich. Op. Att'y. Gen. 70; 1926-28 Mich. Op. Att'y. Gen. 621; 1937-38 Mich. Op. Att'y. Gen. 38.
9. 1957-58 [vol. 2] Mich. Op. Att'y. Gen. 311.

10. 1955-56 [vol. 1] Mich. Op. Att'y. Gen. 262.
11. 1926-28 Mich. Op. Att'y. Gen. 701.
12. 1926-28 Mich. Op. Att'y. Gen. 88.
13. 1907 Mich. Op. Att'y. Gen. 111.
14. 1898 Mich. Op. Att'y. Gen. 88.
15. *Supra* p. 57.
16. 1921-22 Mich. Op. Att'y. Gen. 289.
17. 1952-54 Mich. Op. Att'y. Gen. 440.
18. Unpublished opinion, dated January 8, 1965.
19. 1912 Mich. Op. Att'y. Gen. 212.
20. 1925-26 Mich. Op. Att'y. Gen. 13.
21. 1926-28 Mich. Op. Att'y. Gen. 467.
22. 1943-44 Mich. Op. Att'y. Gen. 364.
23. 1961-62 Mich. Op. Att'y. Gen. 579.
24. 1933-34 Mich. Op. Att'y. Gen. 31.
25. 1957-58 Mich. Op. Att'y. Gen. 26.
26. Created by Act 77, P.A. Mich. (1960), as amended.
27. Unpublished opinion, No. 4132, dated June 17, 1963.
28. 1952-54 Mich. Op. Att'y. Gen. 30; 1959-60 [vol. 2] Mich. Op. Att'y. Gen. 126.
29. 1930-31 Mich. Op. Att'y. Gen. 243.
30. 1957-58 [vol. 1] Mich. Op. Att'y. Gen. 129.
31. 1952-54 Mich. Op. Att'y. Gen. 312; 1955-56 [vol. 1] Mich. Op. Att'y. Gen. 157.

CHAPTER X

THE FACULTY AND EMPLOYEES

1. INTRODUCTION

The first case in this chapter is the famous *Rose* case of the 1870's. This case involved shortages which were found in the student deposit accounts for the chemistry laboratory of the University of Michigan. At issue was whether one Professor Douglas or whether his assistant Rose was responsible for the shortages. The trouble was that Douglas and Rose represented two different religious and political factions into which the University and the City of Ann Arbor were divided. Indeed, the entire State of Michigan seemed to be involved.

The case was litigated in the courts. The opinion of the Supreme Court is included in this chapter, but the case was not settled by judicial decision alone. By the time the case reached the Supreme Court, the Board of Regents was exhausted and was equally divided. For this reason it was not represented before the court. The electorate and the legislature was aroused by the scandal. The full sweep of the case which so seriously endangered the University is described in the survey edited by Shaw, *The University of Michigan: An Encyclopedic Survey.*

The *Buehler* and *Draper* cases involve the application to the University of Michigan of the Workmen's Compensation Act. In these cases the court does not treat the University differently from any regular employer; but these cases should be compared to the *Agler* and *Peters* cases in Chapter III which concerned resistance of Michigan State University to coverage under the Workmen's Compensation Act.

The final case in this chapter raises the most fundamental issue of faculty employment. An Assistant Professor of German at the then Michigan College of Mining and Technology, named Sittler, was dismissed by the college's Board of Control apparently after discovering that he had been a Nazi during the Second

World War. The Supreme Court in deciding whether he was entitled to compensation for the remainder of the academic year did not even consider the reason for his dismissal. The court simply ruled that since the arrangements for the professor's appointment had not been approved by the governing board in formal session, he had no contract with the college. This case was decided before the grant of constitutional status to Michigan Tech, but there is no reason to believe that the lack of constitutional autonomy was decisive in this particular case. Sittler was hired only two weeks before the beginning of classes by the head of the language department. It is the practice of many universities to have the governing board formally delegate emergency authority to fill vacant faculty positions which must be filled in a short time. Since there was no evidence of such formal delegation by the college board in the *Sittler* case, it is not a precedent for cases involving formal delegation.

In this connection, the tenure rules established in the Bylaws of the Regents of the University of Michigan deserve mention. In general, they establish the procedure by which faculty members are given tenure, and they also provide the procedure which must be followed in dismissing a member of the faculty with tenure.[1]

A statute in Michigan requires that all members of the faculties at all colleges and universities in the state, public and private, take an oath to support the constitutions of the state and the country. This loyalty oath is significantly different, however, from the loyalty oath at the University of Maryland which was recently struck down by the United States Supreme Court in the case of *Whitehill v. Elkins,* 88 Sup. Ct. 184 (1967).

2. JUDICIAL DECISIONS

The Regents of The University of Michigan v. Rose

45 Mich. 284, 288, 297-312; 4 N.W. 738 (1881)

[The *Rose* case affected the University much more seriously than is revealed in the court's opinion in this case. Political passions aroused over the disappearance of money from the

chemical laboratory accounts seriously divided the University and the whole State of Michigan. The very independence of the Board of Regents was threatened by an equal division within the board and the possibility of legislative action to break the deadlock. For a complete account of this important episode in the history of the University, see the article by Lewis G. Vander Velde in Volume 1, The University of Michigan—An Encyclopedic Survey, pp. 208-13.]

MARSTON, C. J. In these cases, owing to the extraordinary and unprecedented course adopted by the complainant in the original cause, declining to render that aid and assistance which the researches and argument of counsel would give, and which has been universally recognized as proper and necessary in courts, especially those of last resort, we find the request to dispense with the printing of the record an embarrassing one. We do not know what questions are to be presented on the hearing, or the extent of the investigation that will be found necessary in the determination thereof.

We cannot, therefore, now say that the record should not be printed in the usual manner. That this may result in heavy and unnecessary expense upon the losing party, much of which might be avoided could we have the customary assistance of counsel, is very probable. It is, however, one of the consequences which we cannot avoid, when the case is thus thrown upon us, with no information on one side whether the full printing of the record is or not necessary. We must, as at present advised, assume that such printing is necessary, and act accordingly.

* * *

MARSTON, C. J. The original bill in this cause was filed for an accounting between defendants Douglas and Rose respecting moneys which had been received at the Chemical Laboratory of the University of Michigan, on account of the University, but not paid over or accounted for to the complainants, and for a decree against the defendants, or either of them, for such amount as should be found in their or his hands.

[The appeal is by defendant Douglas.]

* * *

Taking up these several questions raised by the appeal, the first in order will be the one last above stated.

First. Appellant claims to be credited the sum of $390 for error in balance brought forward in his account rendered for 1870-1. I have carefully examined the evidence and the briefs referred to, in order to ascertain if a mistake had been made as claimed. The report made by defendant Douglas to the Regents for 1869-70 showed a balance in his hands belonging to the University of $61.49. The two last items of credits to the University upon this report are under date of June 29, 1870, viz.: June 29th, sundry persons, $836.22, and diplomas $19. His next report to the Regents credits the University, under date of July 1st, "By bal. $451.49." On turning to his book of accounts from which these reports were made I find the balance there stated under the same date $361.49; the other credit items correspond with his report. Turning back upon the same book to his account for 1869 and up to June 29th, 1870, I find the total receipts footed up at $5685.87, and the expenditures at $5324.38; this makes the balance, as stated upon his books, $361.49. It is very clear, however, that a mistake was made in the footing-up of the receipts for 1869, as was pointed out during the argument by one of the members of the court. The correct footing-up is not $5685.87 but $5385.87, thus clearly showing a mistake of $300 to have been made in favor of the University. I have been unable to account for the difference between the amount or balance as shown upon his book and in his report. As already said, the book, as erroneously footed, showed a balance of $361.49, while his report gave the balance as $451.49; the mistake of $300 is clear, while there remains $90 unaccounted for. The evidence tends very strongly to show that this $90 was not received, yet the manner of keeping accounts was so loose and is so unsatisfactory that I am of opinion this $90 should be charged to the defendant Douglas. He having once reported the receipt thereof to the Regents, he must assume the burden of proving the mistake. This has been done to the amount of $300 and that amount should be credited to him.

Secondly. I now come to the question of interest. Defendant Douglas while director of the Laboratory, claiming to have made certain advances therefor, over and above the receipts therefrom in his hands, made monthly balances of his accounts and charged interest upon any balance found in his favor at the rate of ten per cent. per annum. In his annual accounts to the Regents the interest thus claimed and computed was charged. In some of the accounts this charge was more clearly and distinctly set forth than in others, it appearing in all as a charge of interest, but not in every instance showing how or upon what balance it was computed. The fact that such advances were made and that such balance in his favor in fact existed, is not disputed, except upon the theory of charging him with the

entire receipts of the Laboratory. It was farther shown that there was no express authority given him by the Regents to make any advances, or if he did to charge interest thereon. These accounts, when presented to the Board, were usually referred to the finance committee, by them examined, and reported back as being correct. There was no uniformity in the action taken by the Regents upon these reports; some were "accepted and the account and vouchers placed on file," others "accepted," "accepted and adopted," and "adopted." And this is true of all of the reports up to and including the report for 1871-2, except for the year 1866-7, which, although made and referred to the proper committee, the record of the Board fails to show any report made or action taken thereon. The report for that year is found on file, and formed the basis for the next year's report which was acted upon.

It has been claimed that the Regents, in auditing and allowing his accounts, did so in ignorance of the facts relating to the charges of interest, and that the Board had no authority to borrow money or to pay interest upon such advances. I do not deem it necessary to pass upon the question of the power of the Board of Regents to borrow money or to pay interest. I have no doubt but that where money has been paid out or expended for the use and benefit of the University, in cases where the Board could have expressly authorized such expenditures, they may ratify the act and direct payment thereof with interest at any rate not exceeding ten per cent. per annum; and where the Board with full knowledge of the facts has made such payment, such action will be final and cannot afterwards be disturbed.

Did then the Board of Regents pass upon these accounts with full knowledge of the facts? Whether as a matter of fact each member of the Board carefully examined these accounts for the purpose of ascertaining what was charged therein, and the reason therefor, is not of very much importance in the present inquiry. I shall not, therefore, consider the evidence tending to show such to have been the fact. In the presentation of these accounts, and the charges of interest therein, no fraud or concealment was attempted. The accounts upon their face showed certain interest items charged against the University. This was sufficient to put the Regents upon inquiry, and in case they did not fully understand the charge as made, or the reason for making it, it became their duty, before acting farther thereon, to make full investigation and ascertain all the facts relating thereto. No one can doubt for a moment but that a proper investigation would have given them all the facts and circumstances pertaining to this question of interest. Such being the duty of the Board of Regents, this court cannot presume that it was either neglected or carelessly performed by that body. In the absence of fraud it must be

conclusively presumed that the Board did know the facts relating to these charges and allowed them in the light thereof. What was said in *Detroit Advertiser etc., v. City of Detroit* 43 Mich. 116 is equally applicable in this connection and need not here be repeated, and the rule there laid down must be held decisive in the present case upon this question, so far as interest was allowed, which includes the amount in the report for 1871-2 and previous years.

The records of the Board do not show final action upon any report subsequent to that of 1871-2, consequently no allowance of interest thereafter. And I am of opinion, therefore, that interest after that time cannot be allowed in this case. If it could, clearly, under our statute, the rate could not exceed seven per cent, in the absence of a written agreement. Where charged and paid in the absence of such an agreement the person receiving such rate may retain it, but he cannot make that the basis for the recovery of the same rate upon implied contract. I am also of opinion that no implied contract can thus grow up under which interest can be recovered; that the rule applicable between individuals cannot here be followed, but rather the rule applicable between the State or municipalities and individuals must here govern. I have heretofore had occasion to examine the question whether interest could be claimed from the State upon an implied contract, and came to the conclusion that such was not the general rule, and I have seen no occasion to depart from or change the conclusion then arrived at. Report of Auditor General for 1874, ccxlv.

I am of opinion, therefore, that the interest charged in the report for 1872-3 and subsequently, cannot be allowed the defendant.

Thirdly. Old accounts amounting to $53.19. Before attempting to pass upon this and the remaining claim, it might be well to first ascertain the relations existing between the defendant Douglas and the University, and his legal liability to the University resulting therefrom.

As I have already given a full statement of the facts, a brief reference at this point will be sufficient. Defendant Douglas was at an early day appointed assistant professor and afterwards professor of chemistry. As such it was a part of his duty to purchase chemicals for the Laboratory, furnish them to students therein as necessary, collect the price thereof and account therefor to the Board of Regents. Our attention has not been called to, and I have been unable to find, the record of his appointment or the authority then or afterwards expressly conferred upon him. Evidence has been introduced as to what some members of the Board considered his duty, viz., to superintend the business of the Chemical Laboratory, receive and

account for all moneys coming into the same; to act as its director, and to report to the Board the result of the management thereof, including all moneys coming into his hands, and all moneys paid out by him in connection therewith. As early as 1864 assistants were appointed, who, amongst other duties, took charge of the books, dispensed chemicals to the students, kept their accounts, collected from them and paid the same over to defendant Douglas.

In June, 1865, defendant Douglas made a report to the Regents in which the following appeared: *The Dispensing of Chemicals and Apparatus and the Keeping of Accounts in the Laboratory.* An account is kept with each student in the Laboratory, who is made to pay for what he actually consumes; the labor attached to this branch is very great and requires the services of a good and correct accountant; thus, in transacting the business of the past year, there have been made in the books of the Laboratory upwards of 1800 entries of charges and credits, and in the hands of a careless and inefficient man large amounts may be lost to the University. Under all these circumstances I respectfully suggest to your honorable Board the appointment of an assistant of chemistry and lecturer on organic chemistry and metallurgy, at a salary of $1000, and that the remaining two assistants now authorized to be employed be paid, respectively $250 and $300; the expenses of the Laboratory would be thus increased $800; with this sum I think the services of one permanent and efficient assistant can be secured, and if the waste and loss consequent upon irresponsible and inefficient help is taken into account, it will prove little if any more expensive than the present arrangement." At the same session the committee to whom was referred the above reported the following, which was adopted: *"Resolved,* That an assistant professor of chemistry and lecturer on organic chemistry and metallurgy, at a salary of $1000, be employed, and that the remaining two assistants, now authorized to be employed, be paid respectively $250 and $300 per annum." The following was also adopted: "On motion of Regent Knight the appointment of an assistant professor in the Laboratory was referred to the executive committee and Professor Douglas." Under this authority Dr. Lewis was appointed to take charge of the books, dispense chemicals and keep accounts, and he held such position until the spring of 1866, when he resigned, and Dr. Preston B. Rose was then appointed.

I do not understand it to be claimed, or that, as a matter of fact, defendant Douglas, during or after 1864, kept the books of account with the students or dispensed any of the chemicals, or, with a very few exceptions, collected any moneys from the students. The books were kept, and all this work was done, by an assistant who accounted to defendant Douglas.

Under such a state of facts it is important to first determine whether defendant Douglas can be properly charged with and held liable for all moneys, which the books show to have been paid, or which were actually paid, to such assistants, or only for the amount by them paid over to him. I have been unable to discover any principle or decision under which defendant Douglas can in this case be held liable for moneys not actually received by him. No such enlarged responsibility can result from his office or the class of duties he performed. The keeping of accounts and collection of moneys from the students could not, from the very nature of his position and the duties he had to perform, primarily fall upon him. He was not a mere accountant and collector. That duty necessarily must have and was in fact entrusted to others—assistants who were appointed under authority from the Board of Regents, their salary fixed by them, and paid out of University funds. I make no distinction on this account, for there is none, because they may have been paid from Laboratory moneys and by the director; they were none the less University funds which otherwise it would have received. These assistants were not therefore the clerks, servants or agents of the defendant Douglas, for whose acts he would be chargeable, and the mere fact that he had power to employ or discharge them, would not make them such. They were in the employ of the University and were subject to be called to account by, and were responsible to, the Board of Regents for their acts and conduct.

If it was a part of the duties of the defendant Douglas to keep strict watch and account of their doings to prevent loss to the University, and he was guilty of such negligence in this respect as would render him responsible for the losses sustained in consequence thereof, the question might be different, but such is not the theory of the bill in this case.

It is not necessary, however, to rest the case upon this ground alone; as already intimated, the bill of complaint does not seek to charge him with any but the moneys that came into his hands. Farther than this, after the cause had been at issue, counsel representing all the parties, complainants and defendants, entered into a written stipulation, in which I find the following: "*1st.* All the said defendants who have appeared, consent and agree that said Douglas is liable to account to and pay over to said complainants so much of the Laboratory deficit, so called, as came into his lands, and which has not been accounted for by him to the Regents, if any; and also, that said Rose is liable to account to, and pay over to, said complainants so much of said deficit as came into his hands and which he

has not accounted for to said Douglas or to said Regents, if any. * * * *4th.* Nothing contained in the record of this cause, or the decree to be made therein, shall, at any time hereafter, be alleged or held to estop the complainants from calling on said defendant Douglas to account to them for any money which he may have received for their use, other than such as was received by him from or through said defendant Rose."

The authority to enter into this stipulation has not been and could not well be questioned, and it clearly fixes the liability of each to such amount "as came into his hands and which has not been accounted for by him." Whether therefore we look to the bill of complaint, the stipulation, or the legal liability resulting from undisputed facts, we can only charge defendant Douglas with the moneys received by him and not accounted for. It also follows from such a state of facts that there must be evidence, at least, tending to show moneys into Douglas' hands in order to justify the rendition of a decree against him. In stating this I do not overlook the second clause of the stipulation referred to which fixed the amount of the deficit, but left open the question what amount thereof should be charged to Rose and what amount to Douglas. This matter of division or appointment was left to be settled by the court in the usual manner upon relevant and competent testimony in the case. It is not sufficient, therefore, in order to charge defendant Douglas, to show by the books kept by an assistant that a certain amount of money had been paid to the assistant, or, as a fact independent of the books, that such sums were paid to the assistant, as such evidence has no tendency to show that Douglas received it. Proof of these facts would necessarily be one of the steps in the case, but standing alone would fall short of establishing a liability against Douglas, or call upon him to account for what he has not been shown to have received. The burthen of proof, in reference to these old accounts, is upon the complainants; and in reference to the deficit fixed by the stipulation, is upon defendant Rose, to show the money in Douglas' hands in order to charge him therewith. In seeking to establish such fact the rules applicable to the proof of facts in civil cases must be observed, and the fact may be shown by any competent testimony fairly tending, either alone or in connection with other circumstances, to establish it.

I have been wholly unable to find any satisfactory evidence that defendant Douglas received any of these old accounts charged to him in the decree. They are very old matters, running from 1860-1 to 1863-4, and the books kept at that time are principally relied upon to charge him. These books are not in his handwriting; the

evidence shows that they were very carelessly kept; that the tickets then in use were relied upon in the settlement with the students, and that corrections made in the settlement did not necessarily appear upon the books, and that the entries therein are not correct. Under such circumstances I am of opinion that these old accounts should not be charged against the defendant Douglas. It may be very questionable whether the books, kept in such a manner, could be admitted in evidence as against this defendant, but as the proof stands, the question is hardly of sufficient importance to justify an extended discussion.

Fourth. I now come to perhaps the most difficult, certainly the most important, question raised by the appeal. The decree charges the defendant Douglas with certain deficit deposit moneys, paid in 1866-7 and following years up to 1873-4, amounting to $1275 and interest thereon. What has been said under the last subdivision, relating to the old accounts, as to the relation of the several parties, their respective liabilities and the burthen of proof, is equally applicable here and need not be repeated.

The principal evidence relied upon to charge defendant Douglas with the receipt of this deposit money is the stubs remaining in certain books, with the name, or initials, or initial D. thereon, of Douglas as a receipt or voucher that he had received the amount mentioned in such stub. It is not disputed, but it is in fact conceded, that if all the vouchers for deposit money on the stub-books are genuine, the decree in this respect is correct and should not be changed. Defendant Douglas testified that the vouchers on stubs 37 and 44 to 85, inclusive, in sub-book 2, are not in his handwriting, and although testifying that there were others which he believed were not, these were the only stubs specifically pointed out by him. This, in my opinion, puts these stubs in issue, as would an affidavit denying the execution of an instrument sued upon. Twelve stub-books, running from 1866 to 1876, were put in evidence. On nearly all the stubs in these books I find defendant's vouchers, the great bulk of which are unquestioned. I do not, in this connection, refer to the red-line vouchers. Nearly one hundred orders drawn by the recorder upon the treasurer of the city of Ann Arbor, and countersigned by defendant Douglas as mayor, were put in evidence by the defendant Rose. There is also a large number of books and papers in evidence, containing the genuine handwriting of both the defendants Douglas and Rose.

I have made most careful examination and comparison of the writing and signatures of defendant Douglas with the disputed vouchers. I have also made a quite careful examination of defendant

Rose's handwriting and signatures with the disputed vouchers. This last, however, was not as careful as the first for two reasons: *First,* if these disputed vouchers were the work of Rose, I would not expect them to be in his ordinary and natural handwriting but rather as an imitation of Douglas; and *secondly,* if I became satisfied they were not made by defendant Douglas, it would not, for the purpose of this case, become necessary to find by whom made, inasmuch as the case would then be merely this, that defendant Rose had received certain moneys for the payment over of which he had failed to produce vouchers. If I had confined my examination to defendant Douglas' signature on the city orders referred to, and a comparison thereof with the disputed vouchers, I should have no hesitation whatever in saying that the latter were not genuine. The city orders, however, were all countersigned in 1871-'2 and '3—most of them in 1872—while these disputed stubs are dated September, 1867. An examination of the previous stubs in the same book, number 2, running from December, 1866, to the date of the disputed stubs, and of stub-book number 1, running from August 9, 1866, to December 10th of the same year, would not tend to weaken but strengthen such opinion. Thus far there can scarcely be said to be any resemblance whatever between the disputed papers and those shown or admitted to be genuine. No doubt, if all these I have mentioned, numbering about four hundred, should be taken and compared, resemblances might be pointed out between some which are disputed and some conceded to be genuine, but some resemblance would be expected on any theory of the case.

I encounter more difficulty when I come to the examination of other stub-books, for there is unquestionable evidence in the signature and initials not disputed, that the handwriting of defendant Douglas underwent some changes in the period covered by them, which introduces an element of considerable embarrassment in the attempt to test these disputed papers.

In addition to the examination thus made we have the expert testimony, which cannot be overlooked but must receive such weight as in our judgment it is fairly entitled to. I may not be able to agree with the witness to the full extent of his theories, as in saying that certain initials or signatures were not and could not have been made by defendant Douglas, and yet there may be many things in his testimony that will aid us in arriving at a correct conclusion. Evidence as to the genuineness of handwriting given by a witness possessing the requisite experience and skill is admissible, and being so, must be considered, and given, in the light of all the evidence bearing thereon, just such weight as the court or jury may deem it reasonably entitled

to. It cannot be rejected *in toto,* simply because expert testimony, in passing, unheeded, the actions of the respective parties. I do not now refer to opinions of witnesses based upon mere appearances, when parties are questioned touching matters of this character; but to such acts, conduct and utterances as evidently were made deliberately and understandingly. Such acts and declarations have ever been considered competent evidence in civil cases, and are entitled to be weighed and considered in the light of the circumstances under which they were made.

Defendant Rose, when his attention was first called to the fact that the account submitted by him or return made to defendant Douglas was not complete, examined his books and admitted that the names submitted to him were not included; others were presented and like acknowledgments made. He then voluntarily offered to, and did, prepare a list of delinquent accounts for 1874-5, entered it in defendant Douglas' "long-book," and certified to its correctness; said he knew no better way than to find out how many were deficient, and pay them, and did borrow the money and paid them. Afterwards a deficit for previous years was discovered, and on his attention being called thereto, while denying that he was aware of any such deficit, yet he gave security to meet whatever might be found. A list of delinquent accounts for 1873-4 was made out, amounting to over eight hundred dollars, and on the 13th of November, 1875, he certified thereon that, so far as he knew, it was correct according to the examination of the books. He afterwards, on December 7, asked leave to make a supplementary statement thereto on the same paper, which not being permitted, a separate statement was made by him, but which does not explicitly question the correctness of his previous certificate. His admissions to President Angell and others all bear directly upon this question.

Much has been said, in the briefs of counsel referred to, as to the unfairness of the means resorted to for the purpose of procuring these admissions, papers and securities. I cannot agree with counsel in what they have said upon this subject. I certainly have heretofore gone as far as any court has in denouncing attempts to encourage men to commit crime in order to detect and punish them therefor, because of their previous supposed criminal conduct, and I have no desire to depart from what I then said: *Saunders v. People* 38 Mich. 221. But in this matter, in all that was done no effort was made to have defendant Rose commit any wrong, but simply to acknowledge that he had omitted to make proper returns. This is a very common practice, and I certainly see no objections that can be urged against such a course, unless undue means are resorted to, which I think were not in this case, and I fully concur with the learned circuit judge

in what he said in speaking of the trust deed given to secure the Regents against loss on account of delinquencies in former years: "Douglas was not present upon this occasion or connected with the transaction, and there certainly was nothing oppressive or over exacting in the conduct of the two Regents with whom the business was done, or that should excite timidity on the part of Rose." But perhaps the very strongest reasons that can be shown against the charge of undue influence to procure such written admission is the fact that the commissioner, in stating the account, found, and the court below approved his finding, that the list of delinquent accounts for 1874-5, entered and certified upon the "long-book" by Rose as correct, and the delinquent list for 1873-4, as certified to by him on November 13, 1875, already referred to, were in substances correct, and charged him therewith, and with the decree thus rendered he had rested satisfied, having taken no steps to obtain a review thereof.

I have given due consideration to the argument found in the briefs against these things, yet in view of the evidence of the men to whom these statements were made, I cannot come to the conclusion that any undue or improper advantage was sought or taken of defendant Rose, or that the circumstances would justify me in not giving due weight to such testimony. There was no illegal compulsion used, nor was he imposed upon or under duress. Nor have I overlooked the argument that the first D vouchers are denied, and also what is said in reference to the spelling of the word *Dougles* or *Dougled* on stub number 44. Whether this word was so spelled intentionally to furnish an argument against the probability of one familiar with a name thus misspelling it under such circumstances, I pass, but in my opinion this name was not written by defendant Douglas. Nor have I overlooked the offers that were made by defendant Rose asking for investigation. Much may be said in favor of the apparent fairness of some of these propositions, and I have no desire to criticise them; they cannot overthrow or destroy the effect of the evidence in the case, and they can take but very little from its force and effect. There are still other facts and circumstances which might be considered and discussed at considerable length, yet it is deemed unnecessary in the present case.

In view of all the evidence I am of opinion it does not satisfactorily appear that the vouchers in stub book number 2 referred to were written by defendant Douglas, and he should not therefore be charged with the amounts represented thereby.

This still leaves a large number of delinquent deposit accounts charged to defendant Douglas. I have examined and considered with care the argument advanced by his counsel against the allowance of any of these accounts, and acknowledge its force. Bearing in mind,

however, the admitted fact that for all genuine deposit stub vouchers unaccounted for he is responsible, and in view of the farther fact that although called as a witness and thus having full opportunity to point out all such vouchers as he did not believe were genuine, yet he did not deny any others except inferentially. If he had been incapacitated or disqualified as a witness, then no such denial could have been obtained, and the court must, from the other evidence in the case, have passed upon the question. But when a party is living, has been called as a witness, and does not specifically point out and designate those which he claims to be spurious, the court is quite justified in refusing to pay much heed to any elaborate argument by which it is sought to establish their falsity. In the absence of such a denial specifically pointing out those considered not valid, where, as in the present case, the great bulk of them are not questioned, all must be considered *prima facie* valid.

For these reasons I am of opinion that all such delinquent deposit moneys must be charged to the defendant Douglas and that as to these the decree will not be disturbed.

I have thus carefully considered all of appellant's objections to the decree of the court below, except a question of costs. The appellant also insisted that the appeal brought up the whole case for review, and it was argued accordingly. Neither the Regents nor Rose or his sureties appealed, and neither of them appeared by counsel or otherwise in this court. This has been a source of great embarrassment to the court and has greatly increased our labor; and under such circumstances I think we have a right to assume that all parties, except Douglas, are satisfied with the decree as it stands. It is a long and well-settled rule that a decree appealed from by one party only, cannot be changed in the appellate court in favor of the party not appealing; and, as this rule is so well known and understood, it is expected that all parties will appeal who are dissatisfied with the conclusion of the circuit court, and desire to have the decree changed in their favor. The fact of dissatisfaction courts can only know by an appeal regularly taken according to the rules and practice of the court. Nevertheless, as we held in *Grant v. Merchants' etc. Bank* 35 Mich. 515, if in a case of accounting we find occasion to change the decree by allowing in favor of the appellant any items which were rejected in the court below, we will offset to these any other items claimed by the party not appealing which in our opinion were improperly rejected. But when a party acquiesces in the disallowance of any of his claims, and in this court neither by appeal nor otherwise complains of the disallowance, I think we have a right to assume that he is satisfied with the action upon it, and that he does not expect or desire us to examine into it. There may be reasons for his not

desiring it which we could not know without their being explained to us, and it would be presumptuous on our part to treat the case in such a way, or to force the re-opening of matters which the parties concerned chose to leave where they were left in the court below. We can give the appellant relief in so far as the decree may be found to err against him; but where no one else complains or appears, I shall follow the usual custom of courts and refuse to discuss such questions as in the case before us are mere abstractions, since the only possible motive in the discussion would be to express opinions on those parts of the decree below of which no one makes complaint.

The Court will assume, however, that any claim which is made by the appellant in this court, is in issue, and will look through all the evidence for any possible information which will show or tend to show that he is or is not entitled to have it allowed in his favor.

I am of opinion that the decree below should be modified in accordance with this opinion, and that appellant should recover costs in this court.

My brethren concurring, it is so ordered, and a decree will be entered in this court accordingly.

GRAVES, J., concurred.

COOLEY, J., concurring. In these cases it has seemed proper to me, in view of facts with which the public is familiar, that I should leave the examination of the record and the questions involved to be made by my associates without my presence or assistance. They have made their examination accordingly, and the result is embodied in the opinion of the Chief Justice just filed. I have examined that opinion and compared it with the record without finding occasion to disagree.

CAMPBELL, J., being disqualified by relationship to appellants' bail, did not sit in this case.

Buehler v. University of Michigan

277 Mich. 648, 649-51; 270 N.W. 171 (1936)

POTTER, J. Plaintiff, employed at common labor at Martha Cook building, University house, and Alpha Gamma Delta sorority house, all in Ann Arbor, injured her hand while working at the Martha Cook building October 16, 1934.

The first two buildings are operated by the university. The third is not so operated but is separate therefrom. Plaintiff earned at the Martha Cook building $6.30 a week; at University house, $2.85 a week; at Alpha Gamma Delta sorority house, $9 a week—a total of $18.15. At the time of the hearing, plaintiff was earning at the Martha Cook building $6.30 a week; at the University building, $2.85; and at the Alpha Gamma Delta sorority house $4 a week—a falling off in wages of $5 a week, 66-2/3 per cent. of which is $3.33-1/3 a week which was the amount of the award made by the department of labor and industry.

Defendants appeal claiming the award is based upon earnings in which the university is not interested; that earnings, remuneration or income received by plaintiff from others than the insured employer were added to the wages received from the insured employer in computing the average weekly wages of plaintiff. Appellants say this should not be done because the statute, 2 Comp. Laws 1929, § 8427, provides compensation "shall fairly represent the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the accident;" that this provision as construed in *Andrejwski* v. *Wolverine Coal Co.*, 182 Mich. 298 (Ann. Cas. 1916 D, 724, 6 N. C. C. A. 807; *Hirschkorn* v. *Fiege Desk Co.* 184 Mich. 239; *Hartman* v. *Village of St. Clair Shores,* 246 Mich. 603; *Gallup* v. *Western Board & Paper Co.*, 252 Mich. 68; *Carothers* v. *City of Stanton,* 257 Mich. 107; *Laidlaw* v. *City of Ludington,* 272 Mich. 11, and other cases, limits plaintiff to recovering against the university and its insurer compensation based upon her wages earned while employed by the university. Defendants insist to hold otherwise would be to render the operation of the workmen's compensation act uncertain, deprive insurers of the ability to compute premiums on the basis of the wages of the employee, subject employers and insurers to liability which they had not contracted against and which they could not anticipate, and is contrary to the spirit of the statute.

Plaintiff, on the other hand, contends her earnings must be based upon what she earned, on her capacity to earn, or what she might earn in all the various pursuits in which she was engaged at the time the accident occurred; that applied to this case, plaintiff's earnings before the accident were $18.15 and after the accident $13.15 a week—a difference of $5, 66-2/3 per cent. of which is $3.33-1/3, the amount correctly awarded to her by the department of labor and industry, and she relies upon *Miller* v. *S. Fair & Sons,* 206 Mich. 360; *Foley* v. *Detroit United Railway,* 190 Mich. 507; *Sargent* v. *A. B. Knowlson Co.*, 224 Mich. 686 (30 A. L. R. 993).

There is a distinction in fact between the cases which defendants

rely upon and those upon which plaintiff relies. Typical of the cases upon which appellants rely are the cases of part-time firemen paid upon a weekly basis a certain amount, though engaged in and receiving pay in other employment, in which cases it has been uniformly held the party injured was entitled to become compensated upon the basis of the amount received from the particular source of employment as fireman. Typical of the cases relied upon by plaintiff is the night-watchman case *Sargent* v. *A. B. Knowlson Co., supra,* where a watchman was employed to watch several buildings, but where it was held plaintiff's employment was not several as to each person employing his services and the services performed at any particular time were for the benefit of all persons employing him.

We have nothing to do with the policy of the law.* That is a matter for the legislature. But, under the facts in this case, plaintiff was not employed by one of these employers for the benefit of the others. Her employment by each of her employers was separate and distinct from her employment by the others and, under the law, the university may not be held liable for compensation computed on the basis of what plaintiff earned when not employed by the university, and the insurer may not be held liable for compensation based upon earnings by the plaintiff while not on the payroll of the insured.

The award of the department of labor and industry is reversed and the case remanded.

NORTH, C. J., and FEAD, WIEST, BUTZEL, BUSHNELL, SHARPE, and TOY, JJ., concurred.

Draper v. Regents of The University of Michigan

195 Mich. 449, 450-56; 161 N.W. 956 (1917)

KUHN, C. J. The claimant's husband, Jay B. Draper, was, immediately prior to November 13, 1915, superintendent of the University hospitals at a salary of $2,500 a year. Mr. Draper frequently was required, in the course of his employment, to go to the University campus, which is situated about a quarter of a mile southeast of the University hospitals. In order to go to and from the campus it is necessary to cross the street car tracks running along the north side of the campus, on North University avenue. Mr. Draper's home was

*See 2 Comp. Laws 1929, § 8407 *et seq.*—REPORTER.

southeast of the campus, so that the campus was directly between his home and the University hospitals.

It is claimed that it was Mr. Draper's universal custom to take his noon and evening meals at the University hospitals, in the psychopathic ward, unless he was called home for some reason or unless he had business down town which took him away from the hospitals.

On November 13, 1915, he called up his home about 5 o'clock and said he would be home for the evening meal. Half an hour later he was almost instantly killed by a street car as he was about to enter the campus from the direction of the hospitals.

A claim was presented against the Regents of the University of Michigan, and considerable testimony was taken at the hearing. The arbitration committee and the industrial accident board held that the accident which caused Mr. Draper's death did not arise out of and in the course of his employment. We quote from the brief of counsel as the best way to present the claimant's contention:

"Did the accident arise 'in the course of' the employment? The answer to this question depends upon whether Mr. Draper was on his way from the hospitals to the campus to transact some matter of business there on his way home. If he was merely going home to dinner when killed, the accident would not be one in the course of his employment. But if he was intending to stop on the campus on a business errand and then go on home to dinner, the accident would be one in the course of his employment. We think the evidence shows that he had business on the campus to transact before going home, and that this evidence is undisputed and unimpeached.

"Mr. Draper had been superintendent of the hospitals for eight years. Mrs. Draper testified that never during that time had Mr. Draper left the hospital as late as 5 o'clock in the afternoon to come home to dinner unless he had business to transact on the way. It was seldom that he came home for the evening meal, sometimes not more than once in two or three weeks. He took his evening meals at the hospital unless business called him to the campus or down town, and this was his 'universal practice.' * * *

"It must be held, therefore, that a uniform custom to go home for his evening meal only when he had business to transact on the way, is conclusively shown by the evidence.

"The campus was situated between the hospitals and the home of the deceased; so that he could easily transact any business he might have on the campus while on his way home. On the night when he was killed it appears that he called up his home about 5 o'clock and informed his family that he intended to come home for dinner. No plans or arrangements at home required his presence; for his

telephone call was the first intimation the family had that he would come home that night. Hence, if he followed his custom, he must have planned to go home for dinner because he had business to look after on the campus, and since he was killed when about to enter the campus from the direction of the hospitals, he must have been on his way to look after that business when killed.

"Does the proof of a custom constitute *prima facie* evidence that an act was done pursuant to such custom? In other words, will evidence that deceased was accustomed to do a certain act be sufficient to show *prima facie* that he did it? The cases are very clear that evidence of a custom is competent to show the doing of an act coming within the custom"—citing cases.

We think counsel is claiming more for the record than it will justify.

Mrs. Draper was a witness. The following appeared in her testimony:

"*Q.* Did he ever come home to his noon or 6 o'clock meal?

"*A.* Yes, sir.

"*Q.* On what occasions?

"*A.* If he was having business down town or over on the campus at the noon hour or 6 o'clock he would come home.

"*Q.* Was that his universal practice as far as you know?

"*A.* Yes, sir.

"*Q.* Were there any days he came home to any of those meals unless he had business down town, at the bank, or at the campus that you know of?

"*A.* When he was to a game, to a ball game.

"*Q.* When he would be off duty in the afternoon, where would he have his meals? Would he come home? Suppose he had gone to a ball game?

"*A.* He would have his meals at home unless there was something that he had to go back to the office for.

"*Q.* Were there any other times when he came home to his meals other than when he had business at the campus or was down town?

"*A.* Not that I know of."

On the cross-examination she said:

"*Q.* Was your husband in the habit of coming home every Saturday afternoon?

"*A.* No, sir.

"*Q.* He was not obliged to work on Saturday afternoon?

"*A.* Well, that depended on his work. If he had work to do, he would work.

"*Q.* But usually he laid off Saturday afternoon to go to the ball games?

"*A.* If there were games or he had business down town he would go away; aside from that he would stay at the office and work."

She also said he did not attend the ball game on the afternoon when he was hurt.

Miss Burlingame testified in part:

"*Q.* Do you know where he had his 12 o'clock meal and his 6 o'clock meal?

"*A.* At psychopathic hospital.

"*Q.* Always?

"*A.* Not always. If called away, he went home to 6 o'clock dinner. During the football game season he would go home; also if he had business on the campus. Sometimes they called him from his residence, and then he would go home to the evening meal.

"*Q.* When he had business that called him away from the hospital and over to the campus, near his home, what was his custom?

"*A.* He had his meals at psychopathic hospital if his work kept him there until meal time. * * *

"*Q.* Where was he going that afternoon?

"*A.* I think he was going home. He always took the same route going home as he did when he had business at the secretary's office or on the campus.

"*Q.* Did he have business that day?

"*A.* He was anxious to see President Hutchins and Secretary Smith, and they did not come while I was there. * * *

"*Q.* If he had been going to see Secretary Smith or President Hutchins he would have taken this same route?

"*A.* Yes."

Miss Draper, a daughter of the deceased, was a witness. She testified in part:

"*Q.* What was his custom in regard to taking meals at the hospital?

"*A.* He had only two meals at the hospital, the noon meal and the 6 o'clock meal. The only times he did not eat at the hospital was

when he came home, when he went on business to the campus, when he was called home, and when he might be attending some social engagement in the afternoon. That afternoon I do not know whether he had business.

"*Q.* What was his practice when he came home to meals?

"*A.* His universal practice was to call up home when he was coming home to a meal.

"*By Mr. Cavanaugh:*

"*Q.* On Saturdays if he worked at the hospital he had supper there? If he left in the middle of the afternoon what was his custom?

"*A.* I would say that the meals he had on Saturdays were about even at hospital and at home. He always took lunch at the hospital with the exceptions named."

It was shown by the president and the secretary of the University that they had no engagement with Mr. Draper that afternoon, and it was not shown that he had any appointment with the treasurer, nor was it shown what the nature of business down town would be, whether the private business of Mr. Draper or official business.

In *McCoy* v. *Screw Co.,* 180 Mich., at page 458 (147 N. W., at page 573, L. R. A. 1916A, 323), it is said:

"The burden of furnishing evidence from which the inference can be legitimately drawn that the injury arose 'out of and in the course of his employment' rests upon the claimant. *Bryant* v. *Fissell,* 84 N. J. Law, 72 (86 Atl. 458); 3 Negligence & Compensation Cases Annotated, p. 585. Ruegg on Employers' Liability and Workmen's Compensation, p. 343, says:

" 'If an inference favorable to the applicant can only be arrived at by a guess the applicant fails. The same thing happens where two or more inferences equally consistent with the facts arise from them.' "

In *Hills* v. *Blair,* 182 Mich., at page 25 (148 N. W., at page 245), it is said:

"Under the provisions of this act only that employee is entitled to compensation who 'receives personal injuries arising out of and in the course of his employment.' It is to be borne in mind that the act does not provide insurance for the employed workman to compensate any other kind of accident or injury which may befall him. The language of the Michigan compensation law is adopted from the English and Scotch acts on the same subject, and, in

harmony with their interpretations, has been construed by this court, in *Rayner* v. *Furniture Co.*, 180 Mich. 168 [146 N. W. 665, L. R. A. 1916A, 22, Am. & Eng. Ann. Cas. 1916A, 386], as meaning that the words 'out of' refer to the origin, or cause of the accident, and the words 'in the course of' to the time, place and circumstances under which it occurred.

"In *Ayr Steam Shipping Co., Ltd.*, v. *Lendrum*, 6 B. W. C. C. 326, involving a fatal accident attended with uncertainty as to details, the court said:

" 'I think one may deduce from the decisions (1) that the burden is always upon the applicant to prove that death resulted from an accident arising out of as well as in the course of the employment; (2) that such proof need not be direct, but may be by circumstantial evidence, but there must be facts from which an inference can be drawn, as distinguished from mere conjecture, surmise, or probability; and (3) that an award by an arbiter cannot stand unless the facts found are such as to entitle him reasonably to infer his conclusion from them.'

"It is contended by appellants that the facts proven here do not in reason support the inference of the board as to the manner in which deceased met his death, but, on the contrary, conclusively show that he was killed in an attempt to board or leave a moving train, precluding any award under the ruling in *Pope* v. *Hill's Plymouth Co.*, 5 B. W. C. C. 175, in which case a workman in a colliery going home to his dinner on the premises of his employer was killed in attempting to jump on a passing tram car. It is further urged as a defense that, if it cannot be said as a matter of law a finding of fact should have been made as appellants contend, it should at least be held that the proven facts are equally consistent with either one of the two alternatives, and no inferences can legitimately be drawn to support an award.

"We are not prepared to hold that the findings of fact as to the manner of the accident are entirely without evidential support either direct or by inference. They are therefore to be taken as conclusive under the statute. Accepting them as such, do they sustain the conclusion of law that Hills' death arose out of and in the course of his employment?

"It is well settled that the burden rests upon the one claiming compensation to show by competent testimony, direct or circumstantial, not only the fact of an injury, but that it occurred in connection with the alleged employment, and both arose out of and

in the course of the service at which the injured party was employed."

We cannot say as a matter of law that claimant met the burden of proof, and the findings of fact must therefore stand.

The judgment is affirmed.

STONE, OSTRANDER, BIRD, MOORE, STEERE, and BROOKE, JJ., concurred. FELLOWS, J., did not sit.

Sittler v. Board of Control of the Michigan College of Mining and Technology

333 Mich. 681, 683-88; 53 N.W. 2d 681 (1952)

NORTH, C. J. This is an appeal from an order dismissing plaintiff's suit entered in the Michigan court of claims. On December 13, 1950, Edward V. Sittler, plaintiff and appellant herein, filed a verified petition stating a claim against the board of control of the Michigan college of mining and technology, a defendant and appellee herein. The claim was based on an alleged contract of employment as assistant professor of German for the school year September 19, 1949, to June 10, 1950, at a salary of $4,000. Plaintiff alleged that this contract was executed by B. B. Bennett, who was head of the department of languages; that Professor Bennett had authority to make the contract on behalf of the board of control, and that the contract was also ratified by the board of control. The petition further alleged that plaintiff had performed his duties as assistant professor of German from September 19, 1949, to November 10, 1949, at which time his employment was terminated without justification. Plaintiff claims damages of $3,186.60, this being the amount he would have received if his employment had not been terminated. The claimed contract which plaintiff relies upon for recovery is contained in a letter written to plaintiff by Professor Bennett, dated September 12, 1949, the pertinent portions of which we quote:

"This letter will confirm our telephone conversation of September 10th.

"The position which you have accepted is an assistant professorship of German with a salary of $4,000 for the 3-term year

approximately 9 months. As I indicated Saturday raising the salary above the budgeted amount may make it impossible to grant you a salary increase for the 1950-1951 academic year. I believe it was our understanding that the appointment is for a 1-year period but will become a permanent one if both you and the administration of the college are quite satisfied at the end of the first year. * * *

"I am enclosing a formal application blank which you may complete and return to me by mail. If you have available 2 small gloss prints of yourself, please send them along. I shall send to you within the next day or two copies of the texts that have been used in the German work.

"Perhaps some information concerning our payroll procedures would help you in your personal planning. You will go on our payroll on September 19th. Our salary checks always have a 2-week lag. That means that you will receive your first salary check on October 20th. Your checks thereafter you will receive at 2-week intervals. The college pays salary over a full calendar year. That means that you will continue to receive salary checks throughout the summer of 1950. The details of the various deductions we can clarify after you arrive."

Defendants point out that by the statute which sets up the board of control, the authority to enter into such contracts is vested in the board of control. The statute provides:

"The government of the college of mining and technology, the conduct of its affairs, and the control of its property shall be vested in a board of 6 members, not less than 4 of whom shall be residents of the upper peninsula of the State of Michigan, who shall be known as the 'board of control of the Michigan college of mining and technology.' " CL 1948, § 390.352 (Stat Ann § 15.1312).

"As soon as the means in its hands will permit, without incurring indebtedness, said board shall proceed to obtain a suitable location, and lease or erect such buildings, and procure such furniture, apparatus, library, and implements, as may be necessary for the successful operation of said school, and to appoint a principal, and such other teachers and assistants as the board may deem expedient, with salaries, to be paid from time to time, as it may agree, and to regulate their duties; but no agreement shall be valid whereby such board shall be prevented from discharging any one in their employ upon 2 months previous notice." CL 1948, § 390.354 (Stat Ann §15.1314).

This statute vests the authority to appoint or hire teachers in

statutory provision vesting in the board the power "to appoint a principal, and such other teachers and assistants as the board may deem expedient, with salaries, to be paid from time to time, as it may agree, and to regulate their duties" should be construed as applicable only at the inception of the Michigan college of mining and technology, as provided in section 4 of "the original act in 1885" (Act No 70). It is sufficient to note that substantially the same words relating to the hiring of teachers, et cetera, were originally embodied in PA 1861, No 207, and again embodied in PA 1885, No 70. They are still a part of the statute which presently governs the conduct of the affairs of the Michigan college of mining and technology.

Plaintiff asserts that the power to contract with teachers may be delegated, and in the instant case that it is at least a question of fact if such power were not delegated by the board of control to Professor Bennett. In asserting the board's right to delegate the power, which by statute is vested in the board, appellant cites *People* v. *Fournier,* 175 Mich 364 (Ann Cas 1915A, 1015). However we think the cited case is not in point. It involved only the right of delegating the power of passing upon the right to be licensed as a stationary engineer in the city of Saginaw, which was considered necessary to proper administration of the police power. But the instant case involved the right by contract to bind the State in the operation of one of its educational institutions over a period of time and to expend public funds in greater or less amounts. Powers of the character vested by the above statutory provisions in a board of control of an educational institution maintained by the State cannot be delegated to some subordinate or representative.

"The board of supervisors cannot delegate such powers as the law requires to be submitted to their corporate discretion and judgment." *People, ex rel. Chadwick,* v. *County Officers of St. Clair* (syllabus), 15 Mich 85.

"The statutory authority conferred upon boards of supervisors to regulate the bridging of navigable streams is a trust that must be executed by themselves; they cannot delegate it to others." *Maxwell* v. *Bay City Bridge Co.* (syllabus), 41 Mich 453.

It follows that plaintiff did not possess a contract under which he could assert rights. Even the letter written by Professor Bennett does not purport on its face to be a contract. We are mindful that it appears in plaintiff's opposition to the motion to dismiss that on other occasions heads of departments have hired assistant teachers; but such usage or custom, if it ever prevailed, cannot be availed of to enlarge the statutory powers of the board of control so as to include

or justify acts which are unauthorized and contrary to the applicable statutory law. See annotations 65 ALR 811; which include *Hoffa* v. *Saupe,* 199 Iowa 515 (202 NW 234).

"The extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority." *Township of Lake* v. *Millar,* 257 Mich 135, 142.

See, also, *Vincent* v. *Mecosta County Supervisors,* 52 Mich 340; *Schneider* v. *City of Ann Arbor,* 195 Mich 599.

In *Roxborough* v. *Unemployment Compensation Commission,* 309 Mich 505, we quoted with approval the following from 59 CJ, pp 172, 173:

" 'Public officers have and can exercise only such powers as are conferred on them by law, and a State is not bound by contracts made in its behalf by its officers or agents without previous authority conferred by statute or the Constitution. * * * Nor is a State bound by an implied contract made by a State officer where such officer had no authority to make an express one. * * *

" 'The powers of State officers being fixed by law, all persons dealing with such officers are charged with knowledge of the extent of their authority or power to bind the State, and are bound, at their peril, to ascertain whether the contemplated contract is within the power conferred.' "

"Persons dealing with a municipal corporation through its officers must at their peril take notice of the authority of the particular officer to bind the corporation, and, if his act is beyond the limits of his authority, the municipality is not bound." *Rens* v. *City of Grand Rapids* (syllabus), 73 Mich 237.

"But the law holds those dealing with a municipal corporation to a knowledge of the extent of the authority conferred, and of the mode of its exercise, and of all illegalities committed by its agents in not pursuing the authority in the manner pointed out, and visits upon them the consequences of violating the law by refusing to enforce such contract at their instance." *McBrian* v. *City of Grand Rapids,* 56 Mich 95, 108.

Plaintiff did not have a contract with the board of control of the Michigan college of mining and technology, nor were the negotiations between plaintiff and Professor Bennett such as to constitute a contract binding upon the defendants in the instant case. Because of an absolute lack of power vested in Professor Bennett to

consummate a contract with plaintiff which would be binding upon defendants, nothing appearing in this record would or could constitute ratification of an alleged contract as asserted by appellant. While there are presented by the record some controverted issues of fact, nonetheless there are presented questions of law herein considered which are decisive of plaintiff's right to recover. We are of the opinion that the trial judge correctly granted defendants' motion to dismiss. Affirmed, with costs to appellees.

DETHMERS, BUTZEL, CARR, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

3. OATH OF COLLEGE FACULTY

P.A. 1935, No. 23, Imd. Eff. April 19

AN ACT to require all teachers, instructors and professors in educational institutions, junior colleges, colleges and universities to take and subscribe an oath or affirmation to support the constitution of the United States and the constitution of the state of Michigan, to provide the manner for the taking of such oath or affirmation, and to repeal all acts or parts of acts in conflict with the provisions of this act. As amended P.A. 1939, No. 55, Eff. Sept. 29.

The People of the State of Michigan enact:

388.401 Oath of members of college faculty; filing

Sec. 1. From and after September 1, 1935, it shall be unlawful for any citizen of the United States to serve as a teacher, instructor or professor in any state educational institution or any educational institution supported in whole or in part by public funds, or in any junior college, college or university of this state or any junior college, college or university whose property, or any part thereof, is exempt from taxation unless and until he or she shall have taken and subscribed the following oath or affirmation:

"I do solemnly swear (or affirm) that I will support the constitution of the United States of America and the constitution of the state of Michigan, and that I will faithfully discharge the duties of my position, according to the best of my ability."

The oath required by this section shall be notarized and transmitted to the superintendent of public instruction, who shall file it in his office, where it shall be subject to public inspection. It shall be unlawful for an officer, person or board having control of the employment, dismissal or suspension of teachers, instructors or professors in any such educational institution, junior college, college or university to permit a person to serve in any such capacity therein in violation of the provisions of this section. This section shall not be construed to require a person to take such oath more than once during the time he or she is employed in the educational institutions in this state, though there be a change in the title or duties of the position: Provided, however, That this requirement shall not be construed as prohibiting such officer, person or board from employing for limited periods instructors or lecturers who are citizens of foreign countries.

Constitution

Art. 11, § 1, provides: "All officers, legislative, executive and judicial, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of . . . according to the best of my ability. No other oath, affirmation, or any religious test shall be required as a qualification for any office or public trust."

388.402 Same; unlawful employment, penalties

Sec. 2. Any educational institution, junior college, college or university which shall employ any such person in violation of the terms of this act shall, during the continuance of such unlawful employment.

(a) If such be an institution supported wholly or in part by state funds, not receive any state moneys for any purpose whatsoever.

(b) If such institution be a private, charitable and/or denominational college or university whose property, or any part thereof, is exempt from taxation, immediately forfeit all right to such tax exemption.

4. OPINIONS OF THE ATTORNEY GENERAL

In his opinions concerning the faculty and employees of state universities, the Attorney General has affirmed the principle that salaries and terms of employment are to be determined by the governing boards. The first ruling on this subject was in the year 1907. At that time the Attorney General ruled that a statute whose terms applied to salaries at all state institutions did not apply to the University of Michigan.[1] Again, in 1937 the Attorney General construed the intent of the legislature as excluding the University of Michigan and the then Michigan State College—although not excluding the state teachers and normal colleges which at that time did not have constitutional status—from the coverage of the Civil Service Act.[2]

The determinative effect of constitutional status on these opinions is also illustrated by an opinion issued in 1905, before Michigan State achieved constitutional autonomy, which held that the college could not reimburse professors for travel expenses.[3] The same issue was litigated in the case of the *Board of Regents of the University of Michigan* v. *Auditor General* in which the court decided that reimbursement of members of the faculty for travel expenses was a decision for the Board of Regents, not the Auditor General. See Chapter III.

Other opinions of the Attorney General have made the following rulings: veterans' preference laws do not apply to the university;[4] the governing boards may expend university funds to pay for all, or part of, the premiums for group health and life insurance;[5] employees of state universities may, by complying with the conditions of the statute, become or remain members of the State Employees Retirement System;[6] a University of Michigan janitor is a state employee under a statute making state employees ineligible for welfare payments from the county;[7] students employed part-time by state universities are not covered by the minimum wage provisions of the Federal Fair Labor Standards Act;[8] and, under a prior law, university employees did not have to pay federal income tax.[9]

Labor relations between the University of Michigan and trade unions representing employees are the subject of litigation at the time this book is being written. The amended Hutchinson Act, in general, provides state employees with most of the same

rights as those enjoyed by private employees under the National Labor Relations Act. The chief exception is the explicit prohibition of public employee strikes, but the prohibition has not deterred all such strikes. The State Labor Mediation Board under the statute is assigned the functions of the National Labor Relations Board under the federal act. The University, in the course of the current litigation, contends that the board labor relations powers delegated to the Mediation Board by the amended Hutchinson Act interfere with the constitutional power of the Board of Regents over the general supervision of the University and the control and direction of expenditures from its funds. See Chapter III.

Before these issues had arisen, however, the Attorney General had made the following rulings concerning labor relations at the state universities. The Board of Regents, under its constitutional authority, could deduct union dues from the employee's paycheck.[10] The State Board of Agriculture, the old name for the governing board at Michigan State University, was informed that it could discuss conditions of employment with a labor union, but that since any strike against the University would be illegal, the University could not enter into a formal collective bargaining agreement.[11] Before amendment of the Hutchinson Act in 1965, the Attorney General ruled that the act did not apply to the University of Michigan, but, on policy grounds, he advised the University to comply with the general terms of the act.[12]

FOOTNOTES

Section 1 - Introduction

1. Chapter V, Bylaws of the Board of Regents, The University of Michigan.

Section 4 - Opinions of Attorney General

1. 1908 Mich. Op. Att'y. Gen. 95.
2. 1937-38 Mich. Op. Att'y. Gen. 382.
3. 1905 Mich. Op. Att'y. Gen. 85.
4. 1930-32 Mich. Op. Att'y. Gen. 475.

5. 1961-62 Mich. Op. Att'y. Gen. 194.
6. 1951-52 Mich. Op. Att'y. Gen. 234; 1955-56 [vol. 2] Mich. Op. Att'y. Gen. 127.
7. 1945-46 Mich. Op. Att'y. Gen. 291.
8. Unpublished opinion, No. 3022, dated June 12, 1957.
9. 1913-14 Mich. Op. Att'y. Gen. 543.
10. 1959-60 Mich. Op. Att'y. Gen. [vol. 2] 111.
11. Unpublished opinion, No. 05115, dated October 14, 1946.
12. 1951-52 Mich. Op. Att'y. Gen. 63.

CHAPTER XI

STUDENTS

1. INTRODUCTION

The three cases in this chapter have widely varied facts. The first case, *Booker v. Grand Rapids Medical College,* is a classic civil rights case. A private, profit-making school had admitted a Negro student, but after encountering objections to his presence from other students, the school refused to allow him to complete his course of study. The court recognized an implied contract made on the admission of students by the college that students would not be arbitrarily dismissed; but it refused to enforce this right by mandamus.

The case of *Tanton v. McKenney* involved a young lady attending Michigan State Normal College in the 1920's. She was refused re-admittance to the school because of her addiction to smoking cigarettes in public and riding around town in an automobile on the lap of a young man. She was given a hearing and was reprimanded for her acts by the school authorities. The court agreed that such behavior was not appropriate for a future teacher, and it denied her relief.

In a relatively recent case, *In re Johnston,* suit was brought by a medical student to compel the University of Michigan to grant him a medical degree. He argued that the University could not require him to pass a nationally administered examination because such a requirement would be an invalid delegation of power to the national testing organization. The court did not agree.

Three law students at the University of Michigan have recently filed suit in the federal district court to challenge the validity of University regulations. The suit alleges that the plaintiffs have been denied the equal protection of the laws because they are classified as non-residents for tuition purposes but as residents for purposes of the state income tax.

James A. Perkins, president of Cornell University, recently outlined legal problems in the area of university and student relationships and contrasted past concepts with emerging doctrine. His address was given in Boston, Massachusetts on December 8, 1967 at the Annual Meeting of the New England Association of Colleges and Secondary Schools. It was published by the American Council of Education and was reprinted in A.G.B. Reports, Vol. 10, No. 6, March 1968. This is a publication of the Association of Governing Boards of Universities and Colleges which has its principal office in Washington, D.C.

2. JUDICIAL DECISIONS

Booker v. Grand Rapids Medical College

156 Mich. 95, 96-97, 98-101; 120 N.W. 589 (1909)

OSTRANDER, J. The respondent is an institution incorporated under chapter 218, 2 Comp. Laws. Its purposes, expressed in its articles of association, are to establish and operate a college for teaching medicine and surgery, chemistry, dentistry, veterinary medicine and surgery, and horseshoeing, and to grant degrees and issue diplomas in various departments of the college in conformity with law, etc. Its rules and prospectuses do not distinguish or specify, except by age, character, and educational qualifications, the persons to whom instruction will be given. It has capital stock, is conducted for private gain, and is supported by tuition fees paid by students. Relators are citizens, respectively, of the States of Kansas and of Michigan, who attended the college in the department of veterinary medicine and surgery for one—the freshman—year, and were refused admission therein the second year for the sole reason that they were negroes. They applied to the circuit court for the county of Kent for a writ of mandamus to compel the respondent to admit them as students in the college. An order to show cause was entered and an answer to relators' petition was filed. Thereupon 30 issues of fact were proposed by relators, and an order was made that issues be framed as proposed, and that they be submitted to the court for determination. A hearing was had, a large amount of testimony was taken, and the writ was issued. The respondent sued out a writ of certiorari, the affidavit for the writ setting out the petition, the answer, the testimony, verbatim or by way of recital, the issues of fact which were

proposed by relators, and the reasons relied upon for a reversal of the order granting the writ. The return to the writ is, like the affidavit, voluminous, and sets out in full the testimony produced at the hearing. It does not appear in what manner the court determined any of the issues of fact, and the reasons given for the conclusion which was reached are not found in the record. In certiorari proceedings this court considers questions of law only, and such questions of law as are supposed to be presented in the particular case must be raised in the affidavit for the writ.

* * *

While relators do contend that the facts set out in the petition and supported by testimony establish contract relations between the parties, they also assert that the statute imposes a duty, public in its nature, upon the institution incorporated thereunder, to receive them, to compel the performance of which duty the writ of mandamus is appropriate. In the absence of findings, we have examined the record for evidence which will sustain the order of the court below. It is plain that respondent is organized for the very purpose of giving the instruction sought for by relators. The course of study adopted cannot be finished in one year. The statute requires at least two years' study before candidates may be given a diploma. In fact, the course is one of three years. It is empowered to grant diplomas and degrees to students who finish the course. The course of study adopted is not pursued by students who attend the college for the sole purpose of gaining instruction, but for the further purpose of securing, at the end of the course, the diploma and degree which respondent is empowered to confer. By the laws of this and of other States the diploma confers upon the possessor the right to a license to practice the adopted profession. It is expressly provided in the act that diplomas granted by the trustees shall entitle the possessor to all the immunities which by usage or statute are allowed to possessors of similar diplomas granted by any similar institution in the United States. 2 Comp. Laws, § 8143. Relators matriculated, attended the college for one year, and have the standing necessary to continue the course. They are obnoxious to no rule of the institution. There is testimony tending to prove that during the year relators attended college one and perhaps more than one student withdrew because colored men were admitted, and that a considerable number of students threaten to withdraw if they are now allowed to attend.

The statute imposes no general public duty upon respondent to admit as students any and all citizens to its capacity. There is no specific duty imposed by law to admit relators. It seems clear that

private institutions of learning, though incorporated, may select those whom it will receive, and may discriminate by sex, age, proficiency in learning, and otherwise. Probably no reason need be given for refusing in the first instance to admit any student. Relators have been denied no privilege or immunity resting in positive law protected or guaranteed by the Federal or the State Constitution. Such rights as they have grow out of the relations they have established with respondent, and are no other or different than those of any citizen who has established like relations with a similar institution. These relations, while in some respects peculiar, are, in fact, easily classified. There is no agreement by the terms of which respondent undertakes to bestow and they to receive and to pay for a three years' course of study upon the conditions which the rules of the institution impose. Relators are at liberty to terminate all relations at any time. It does not follow that respondent has the same right. In fact, when one is admitted to a college, there is an implied understanding that he shall not be arbitrarily dismissed therefrom. The required fees may be paid annually, and may be no more than fair fees for the advantages received by the student during the year, and yet it is clear that the fees for the first year are, in fact, paid and received with the understanding that the work of the year will not be made fruitless, a graduation and a degree made impossible, by an arbitrary refusal to permit further attendance. In this understanding there is no want of mutuality. There is no want of good and valuable consideration. There is written evidence of it in the articles of association and the prospectuses of respondent and in the rolls of the college in which relators' names are entered as matriculates. There is no good reason why the law should not recognize, as growing out of these relations, a right of relators resting in contract to be continued as students by the respondent.

It is the general rule that mandamus does not lie to compel a private corporation to perform its obligations resting in contract with an individual. We are referred to no decision of this court recognizing any other rule. A case in which the rule was enforced by denying the writ to one who had completed a course in an incorporated college and had been refused a diploma is *State, ex rel. Burg.*, v. *Milwaukee Medical College,* 128 Wis. 7 (3 L. R. A. [N. S.] 1115). In the opinion in that case and in the motion for a rehearing many authorities are cited, among them *Clarke* v. *Hill,* 132 Mich. 434. The writ was held to be the only adequate remedy in *Baltimore University* v. *Colton,* 98 Md. 623 (64 L. R. A. 108), and in *People, ex rel. Cecil,* v. *Bellevue Hospital Medical College,* 60 Hun (N. Y.), 107, 128 N. Y. 621. It cannot be said that relators are members of an incorporated society, and have been wrongfully deprived of the privileges of members,

which is the ground of decision in *Baltimore University* v. *Colton, supra.* It may be said, perhaps, that the New York decision is rested upon the notion that relator had acquired a status, evidence of which, in the form of a degree, was arbitrarily refused. The court of appeals delivered no opinion. If mere expedition in securing some remedy is to be made the test, it may be said there is no other adequate remedy for relators. And, if enforcement of the obligations of private corporations by mandamus is to be entered upon by the courts, we know of no rule by which it can be determined in what cases the writ should be refused. The apparent hardship of a particular situation is not a good reason for departing from the rule.

The order granting the writ is reversed, with costs to plaintiff in certiorari.

GRANT, MOORE, BROOKE, and McALVAY, JJ., concurred.

Tanton v. McKenney

226 Mich. 245, 246-53; 197 N.W. 510 (1924)

FELLOWS, J. The plaintiff, Alice Tanton, a young lady 18 years old, attended the Michigan State Normal College at Ypsilanti during the fall term 1921 and the winter term 1922. She was refused readmission for the spring term 1922. The refusal was based on an investigation of plaintiff's conduct made by defendant Bessie Leach Priddy, dean of women of the institution, and was approved by the president, defendant Charles McKenney. Before taking such action Mrs. Priddy called plaintiff in, fully apprised her of the information which had come to her as dean of women, and gave her ample opportunity to explain her conduct. Shortly thereafter plaintiff instituted mandamus proceedings in the Washtenaw circuit court to compel her reinstatement. Issues were framed and a trial had at which considerable testimony was taken. The trial judge found the facts to be with the defendants; that plaintiff had become addicted to the smoking of cigarettes before coming to the institution and continued their use there; that she smoked cigarettes on the public streets of Ypsilanti; that she rode around the streets of Ypsilanti in an automobile seated on the lap of a young man and was guilty of other acts of indiscretion; and that she aired her grievances and her defiance of disciplinary measures in the public press which tended to prevent her return to the institution and the maintenance of discipline there. He found as matter of law that defendants had

acted within their power and that there had been no abuse of discretion, and denied the writ. This action is here reviewed on certiorari.

We may on certiorari examine the record to determine whether there is any testimony to support the findings but not to weigh such testimony. An examination of the record before us discloses an abundance of testimony to sustain the findings in the instant case. Indeed plaintiff's own testimony sustains them although she seeks to minimize her acts.

Preliminary to the consideration of the main questions plaintiff's counsel insists that there was error in the rejection of certain testimony offered by him. He apparently sought to show that some of the male students and professors at the University smoked. This testimony was rejected by the trial judge and correctly rejected. The rules of discipline at the University might be entirely inappropriate for an institution having as students over 1,400 girls of tender years. This brings us to the meritorious questions of whether defendants have the power here exercised and whether there has been an abuse of such power.

As is well known, the Michigan State Normal College is maintained at the expense of the taxpayers to prepare teachers for our public schools. The student body is made up almost entirely of young women who have chosen teaching as their profession. They are required to sign a "declaration of intention" couched in the following language:

"We, the subscribers, do hereby declare that it is our intention to devote ourselves to the business of teaching in the schools of this State, and that our sole object in resorting to this normal school is the better to prepare ourselves for the discharge of this important duty."

Inherently the managing officers have the power to maintain such discipline as will effectuate the purposes of the institution. Their powers are somewhat analogous to the powers of school boards in our country schools and boards of education in our cities. In the consideration of their powers we must also bear in mind that the students at our normal schools are being fitted for a profession requiring the highest standard of personal conduct. The right to attend our public schools is beyond question. That such right is tempered by, and subject to, proper regulations in the furtherance of discipline is likewise beyond question. That in the absence of an abuse of discretion the school authorities and not the courts shall prescribe proper disciplinary measures is, we think, settled by the textwriters and the adjudicated cases.

A few excerpts from the article on "Schools" in Ruling Case Law will be helpful in determining the rule to be adopted. We quote the following:

"There is no necessity that all the rules, orders and regulations for the discipline, government and management of the schools shall be made a matter of record by the school board, or that every act, order or direction affecting the conduct of such schools shall be authorized or confirmed by a formal vote. It is recognized that no system of rules however carefully prepared can provide for every emergency, or meet every requirement. In consequence, much must necessarily be left to the individual members of the school boards, and to the superintendents of and the teachers in the several schools. It follows that any reasonable rule adopted by a superintendent, or a teacher merely, not inconsistent with some statute or some other rule prescribed by higher authority, is binding on the pupils." 24 R. C. L. p. 574.

"Control by Courts. The courts will not interfere with the exercise of discretion by school directors in matters confided by law to their judgment, unless there is a clear abuse of the discretion, or a violation of law. So the courts are usually disinclined to interfere with regulations adopted by school boards, and they will not consider whether the regulations are wise or expedient, but merely whether they are a reasonable exercise of the power and discretion of the board. Acting reasonably within the powers conferred, it is the province of the board of education to determine what things are detrimental to the successful management, good order, and discipline of the schools and the rules required to produce these conditions. The presumption is always in favor of the reasonableness and propriety of a rule or regulation duly made. The reasonableness of regulations is a question of law for the courts." 24 R. C. L. p. 575.

"Suspension or Expulsion by Directors. The enjoyment of the right of attending the public schools is necessarily conditioned on compliance by pupils with the reasonable rules, regulations, and requirements of the school authorities, breaches of which may be punished by suspension or expulsion. Ordinarily the school authorities have the right to define the offenses for which the punishment of exclusion from school may be imposed, and to determine whether the offense has been committed, the limitation on this authority being that it must in both respects be reasonably exercised. The power of expulsion given to the directors is not limited to cases of infraction of such rules as they may have therefore adopted, but

extends to cases where they may have become satisfied that the interests of the school require the expulsion of a pupil on account of his gross misbehavior, and the discretion vested in school authorities in this respect is very broad, but they will not be permitted to be arbitrary. In the school, as in the family, there exists on the part of the pupils the obligation of obedience to lawful commands, subordination and civil deportment, respect for the rights of others, and fidelity to duty. These obligations are inherent in any proper school system, and constitute, so to speak, the common law of the school. Every pupil is presumed to know this law, and is subject to it, whether it has or has not been re-enacted by the district board in the form of written rules and regulations." 24 R. C. L. p. 646.

In *State, ex rel. Dresser,* v. *District Board,* 135 Wis. 619 (116 N. W. 232, 16 L. R. A. [N. S.] 730, 128 Am. St. Rep. 1050), it was said:

"It is clear, therefore, that a rule might have been adopted by the school authorities to meet the situation here presented. This court in the quotation already made from the opinion in the *Burpee Case* recognizes certain obligations on the part of the pupil which are inherent in any proper school system, and which constitute the common law of the school, and which may be enforced without the adoption in advance of any rules upon the subject.

"This court therefore holds that the school authorities have the power to suspend a pupil for an offense committed outside of school hours and not in the presence of the teacher which has a direct and immediate tendency to influence the conduct of other pupils while in the school room, to set at naught the proper discipline of the school, to impair the authority of the teachers, and to bring them into ridicule and contempt. Such power is essential to the preservation of order, decency, decorum, and good government in the public schools."

And in *Wilson* v. *Board of Education,* 233 Ill. 464 (84 N. E. 697, 15 L. R. A. [N. S.] 1136, 13 Ann. Cas. 330), it was said:

"The power of the board of education to control and manage the schools and to adopt rules and regulations necessary for that purpose is ample and full. The rules and by-laws necessary to a proper conduct and management of the schools are, and must necessarily be, left to the discretion of the board, and its acts will not be interfered with nor set aside by the courts unless there is a clear abuse of the power and discretion conferred. Acting reasonably within the

powers conferred, it is the province of the board of education to determine what things are detrimental to the successful management, good order and discipline of the schools and the rules required to produce these conditions."

Pugsley v. *Sellmeyer,* 158 Ark. 247 (250 S. W. 538), cited by plaintiff's counsel on another point, is to the same effect. In that case the petitioner had been expelled for violating a rule against the use of cosmetics. In denying the writ of mandamus to compel her reinstatement it was said:

"The question, therefore, is not whether we approve this rule as one we would have made as directors of the district, nor are we required to find whether it was essential to the maintenance of discipline. On the contrary, we must uphold the rule unless we find that the directors have clearly abused their discretion, and that the rule is not one reasonably calculated to effect the purpose intended, that is, of promoting discipline in the school; and we do not so find. * * *

"Courts have other and more important functions to perform than that of hearing the complaints of disaffected pupils of the public schools against rules and regulations promulgated by the school boards for the government of the schools. The courts have this right of review, for the reasonableness of such rule is a judicial question, and the courts will not refuse to perform their functions in determining the reasonableness of such rules, when the question is presented. But, in doing so, it will be kept in mind that the directors are elected by the patrons of the schools over which they preside, and the election occurs annually. These directors are in close and intimate touch with the affairs of their respective districts, and know the conditions with which they have to deal. It will be remembered also that respect for constituted authority and obedience thereto is an essential lesson to qualify one for the duties of citizenship, and that the schoolroom is an appropriate place to teach that lesson; so that the courts hesitate to substitute their will and judgment for that of the school boards which are delegated by law as the agencies to prescribe rules for the government of the public schools of the State, which are supported at the public expense."

In the recent case of *Finch* v. *School District,* 225 Mich. 674, this court having before it the finality of the decision of the school board finding the teacher guilty of gross immorality, speaking through the present Chief Justice, said:

"The school board, a deliberative public body in the exercise of a right, here reserved by contract, went to a hearing, *quasi*-judicial

in character, and, having grounds to sustain its finding, found that plaintiff had been guilty of gross immorality and dismissed him. Surely, the school district may not be required to accept the finding of a jury upon this question rather than the finding of its school board. If such finding by the school board may be reviewed and reversed by a jury, the government of our schools may be impaired and the position of school boards in dealing with such cases will be precarious indeed. Such finding and determination of the board are conclusive unless the board acted corruptly, in bad faith, or in clear abuse of its powers."

See, also, *Covington Board of Education* v. *Booth,* 110 Ky. 807 (62 S. W. 872, 53 L. R. A. 787); *Hysong* v. *School District,* 164 Pa. St. 629 (30 Atl. 482, 26 L. R. A. 203, 44 Am. St. Rep. 632); *O'Connor* v. *Hendrick,* 184 N. Y. 421 (77 N. E. 612, 7 L. R. A. [N. S.] 402, 6 Ann. Cas. 432); *State, ex rel. Andrew,* v. *Webber,* 108 Ind. 31 (8 N. E. 708, 58 Am. Rep. 30); *Kinzer* v. *School District,* 129 Iowa, 441 (105 N. W. 686, 3 L. R. A. [N. S.] 496, 6 Ann. Cas. 996); *Creyhon* v. *Board of Education,* 99 Kan. 824 (163 Pac. 145, L. R. A. 1917C, 993); *McCormick* v. *Burt,* 95 Ill. 263 (35 Am. Rep. 163).

The contention of plaintiff's counsel that she was expelled without a hearing is not supported by the record, which established the contrary. Upon the question of how formal the hearing must be, see *Vermillion* v. *State,* 78 Neb. 107, 110 (110 N. W. 736, 15 Ann. Cas. 401).

This record affirmatively establishes as found by the trial judge that there has been no abuse of discretion, no arbitrary action on the part of the defendants or either of them. The dean of women, Mrs. Priddy, who primarily had the matter in charge, showed every consideration for this plaintiff and displayed a motherly interest in her. She urged upon plaintiff's older sister the imperative necessity of getting plaintiff out of the rut she was traveling in and proffered her assistance and aid. Instead of accepting, plaintiff after consulting her older sister proceeded to air her defiance of discipline in the public press. This of itself was sufficient grounds for refusing her readmission. *Wayland* v. *Hughes,* 43 Wash. 441 (86 Pac. 642, 7 L. R. A. [N. S.] 352). Instead of condemning Mrs. Priddy she should be commended for upholding some old-fashioned ideals of young womanhood.

The writ of certiorari will be dismissed and the judgment of the circuit court of Washtenaw county denying the writ of mandamus will be affirmed.

CLARK, C. J., and McDONALD, BIRD, SHARPE, MOORE, STEERE, and WIEST, JJ., concurred.

In re Johnston

365 Mich. 509, 509-10; 114 N.W. 2d 255 (1962)

SOURIS, J. Some time after plaintiff entered the medical school of the University of Michigan, all senior students were required to take an examination sponsored by a national board of medical examiners. Upon failing portions of that examination, which plaintiff took in April of 1958, he was required to submit himself for comprehensive oral examinations by the faculty in each of the subjects he failed on the national board examination. Again, he failed at least 1, and possibly 2, of the subjects on which he was orally examined. For these reasons, the plaintiff was not awarded his medical degree in June of 1958 and, without that degree, could not take the State board examination for license to practice medicine in Michigan which he had been scheduled to take on June 9, 10, and 11, 1958.

Plaintiff seeks our writ of mandamus to compel defendants to confer upon him a medical degree and to give plaintiff the State board examination for license to practice medicine.

I concur in dismissal of this petition for want of merit in plaintiff's claims that he was deprived of a contractual right and that the defendants unlawfully delegated their powers to a national board of medical examiners. I would also award costs to the defendants.

DETHMERS, C. J., and CARR, KELLY, BLACK, KAVANAGH, and OTIS M. SMITH, JJ., concurred

ADAMS, J., took no part in the decision of this case.

3. OPINIONS OF THE ATTORNEY GENERAL

Tuition and fees charged by state universities have been the subject of several opinions of the Attorney General. According to statutes still on the books the University may not charge tuition to residents of the state in general, or, to residents who are the children of war veterans.[1] The Attorney General has, on different occasions, ruled that both statutes are unconstitutional.[2] Insofar as the Board of Regents itself creates a different tuition scale for residents and nonresidents, the Attorney General has ruled that it is the function of the board to adopt regulations defining "residents."[3]

College fraternities have also raised questions which have been ruled on by the Attorney General. In answer to an inquiry from Michigan State University which seems to have been considering the outlawing of fraternities on its campus, the Attorney General considered several out-of-state cases which had protected college fraternities from arbitrary actions by the college authorities.[4] Over the years, however, Michigan State seems to have changed its plans for fraternities, and asked the Attorney General whether it could assist the fraternities in building houses on the campus. The Attorney General vetoed this plan on the grounds that it would be extending the credit of the state to a private association in violation of the provisions of the Michigan Constitution.[5] Very recently, it was reported that the Attorney General again was presented with an issue concerning college fraternities. This time, he ruled that it is illegal for college fraternities to discriminate against persons because of their race.[6]

In miscellaneous matters which have involved students, the Attorney General has issued the following rulings: state universities have the authority to accept funds to be used for student loans;[7] a private college is not responsible for the debts of its students;[8] a statute which would have exempted student members of the National Guard from the requirement of Reserve Officers Training Corps is not valid;[9] a state college does have the authority to regulate off-campus housing of its students.[10]

FOOTNOTES

Section 3 - Opinions of Attorney General

1. Mich. Comp. Laws § § 390.13, 35.111.
2. Unpublished opinion, No. M-541, dated June 3, 1959; 1937-38 Mich. Op. Att'y. Gen. 29.
3. 1901 Mich. Op. Att'y. Gen. 87.
4. 1912 Mich. Op. Att'y. Gen. 93.
5. 1926-28 Mich. Op. Att'y. Gen. 88.
6. Letter from Attorney General Kelley to Representative Del Rio, February 29, 1968.
7. 1931-32 Mich. Op. Att'y. Gen. 293.
8. 1926-28 Mich. Op. Att'y. Gen. 714.
9. 1949-50 Mich. Op. Att'y. Gen. 405.

APPENDICES

APPENDIX I

CASES IN THE WASHTENAW CIRCUIT COURT INVOLVING THE UNIVERSITY OF MICHIGAN

Since the University's founding in 1817, its governing board has had the authority to sue and to be sued. The University was moved from Detroit to Ann Arbor in 1837 and activated in 1841, and, since then, the Circuit Court for Washtenaw County has served as the forum for many suits by and against the University. However, the *Glass* and *Fox* cases discussed in Chapter VII may indicate that hereafter the Court of Claims, and not the Circuit Court, will have exclusive jurisdiction over certain suits against the University.

The Supreme Court cases included in this book reveal some of the cases originally filed in the Circuit Court; but not all such cases have been appealed to the Supreme Court. To discover what kinds of cases were filed in the Circuit Court, but not appealed to the Supreme Court, the Circuit Court records were examined in the Washtenaw County Courthouse.

It is much harder to extract information from trial court records than from the opinions of judges in appellate court reports for several reasons. In many cases, the records are simply incomplete. Often, it is impossible to determine the ultimate disposition of the case. In other cases, orders of dismissal entered on stipulation apparently indicate settlements, but there is no way to discover the reasons for or the terms of the settlements. There is still another limitation on the use of trial court records. The pleadings contain merely the unsubstantiated charges made by the parties which may not have been proven. Modern rules of procedure, in fact, permit these pleadings to be amended at almost any time.

Nevertheless, with all their limitations, it may be useful to review the records of these cases.[1] In all, 44 cases were found in the records of the Circuit Court excluding those ultimately decided by the Supreme Court. In 17, the University was the

plaintiff, and three of these were condemnation cases in which the state was the nominal plaintiff. In 27 cases the University was the defendant.

The 17 cases brought by the University as a plaintiff may be broken down into the following categories: Four suits to quiet title to land; three actions to condemn land for University use; two mortgage foreclosures; three suits based upon promissory notes, two of which were given in consideration of hospital services; three suits for the payment of goods and services; one rather vague suit for "damages in assumpsit"; and one suit for an injunction.

The 1907 suit for an injunction is probably the most interesting case in this series. According to the pleadings in this case, the University sought the injunction against a publisher who was advertising a series of lecture notes for courses offered in the Law School. Since the Law School had recently discarded the lecture method and had adopted the case method, the University alleged that the advertising of lecture notes had damaged its reputation; and that their sale to students would result in the purchasers receiving an inferior education, also that class attendance would be discouraged. Attached to the bill of complaint is a Law School catalogue describing the courses then offered and the names of the members of the law faculty. Typically enough, the case apparently was settled out of court, and it was dismissed on stipulation.

The 27 cases brought against the University are even more varied. Seven cases are for alleged malpractice at the University Hospital. There are also another five personal-injury cases filed against the University: two of which involved University-owned automobiles; one a University bus; the fourth, a University elementary school pupil allegedly injured while moving a piano under the direction of a teacher; and the fifth, involving a dental patient who fell down two steps which she alleged were located "in an area where a reasonably prudent person would not anticipate their presence." One case involved property damage to an automobile at a carport under construction, and three cases contain such vague allegations as "trespass," "negligence," "breach of contract," "breach of warranty," and a "claim for $36,000." In five cases it was claimed that the University owed money under contracts for railroad freight, for the repayment of certain

money under dispute in the famous *Rose*[2] case of the 1870's, for electricity and for construction services at University-owned Willow Run Airport, and for a raccoon coat checked at the Michigan Union. There were three suits filed during the depression under the State Moritorium Act extending the time for redemption under mortgage foreclosure proceedings. One suit, apparently contemporaneous with *Weinberg*,[3] was instituted by a supplier of an insolvent subcontractor for the construction of University Hospital which had not been required by the University to furnish a bond. A more recent case was filed by the owner of a cemetery lot protesting the cemetery company's sale of most of its land to the University. And, finally, a father won an injunction against the University and his divorced wife forbidding the University Hospital to release a child to the wife who had lost legal custody by the divorce decree.

FOOTNOTES

1. One pending case is entitled *The Regents of the University of Michigan v. The Labor Mediation Board* and is discussed in Chapter III.

2. See p. 294, *supra.*

3. See p. 57, *supra.*

APPENDIX II

BYLAWS & REGULATIONS OF THE UNIVERSITY

The University of Michigan now conducts its affairs on campuses in Ann Arbor, Flint and Dearborn. It instructs over 37,500 students. It employs thousands of teachers of different academic rank and thousands of employees. It has a huge payroll and the entire 1968-1969 budget is just shy of $234,000,000, which is greater than the annual budget of many of our smaller states. In short, it is a vast, throbbing, growing organization.

The internal affairs of the University, varied and complex, are basically regulated under Bylaws adopted from time to time by the Board of Regents. Presently they are being revised in an updating process which is nearly completed. These laws set up basic rules for government of the University in the following areas as described below in the table of contents of the University's Bylaws:

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CHAPTERS

Finally, it is thought that by reading the Preface to the former Bylaws the reader will gain a good perspective of the rule-making power within the University as exercised by the Board of Regents and under their direction and control, by other authorities of the University.

It is here set forth verbatim:

PREFACE

A brief explanation of the rule-making powers effective within the University will serve the useful purpose of indicating the scope of the Bylaws of the Board of Regents, drawing the line between the legislative powers exercised directly by the Board and the sublegislative powers of the various subordinate University authorities.

Rule making within the University is divided three ways: (1) Bylaws of the Board of Regents, (2) Rules initiated by subordinate University authorities, which become effective only upon approval by the Board of Regents, and (3) Rules adopted by subordinate University authorities under delegated legislative powers, which will become effective as provided by such subordinate authorities.

(1) *The first class,* the Bylaws of the Board of Regents, comprises the rules concerning the more important matters of general University organization and policy, as distinguished from administrative details and specific technical requirements of the several

fields of instruction. Moreover, these Bylaws include rules, regardless of importance, with respect to which it is desirable to afford positive notice to all interested persons. Bylaws are adopted directly by the Board of Regents in the exercise of the Board's legislative powers, although they may and often do actually originate in the form of recommendations from some University agency such as a school or college, the University Senate, or other sublegislative forum.

(2) *In the second class of rules* are those initiated by subordinate University authorities, which become effective only upon approval by the Board of Regents but which are not of sufficient general importance or interest to warrant inclusion in the Bylaws. This class embraces the more technical and detailed rules, such as those relating to admission, graduation, and other educational matters within the peculiar competence of the several school and college faculties. Since such rules do not constitute a part of the Regents' Bylaws, they may be modified without the formalities requisite to the amendment of the Bylaws. For the sake of completeness of the record, such rules are published in the Proceedings of the Board of Regents after being approved.

(3) *In the third class of rules* are those concerning numerous matters of even less general importance than those included under the last preceding heading: for instance, grading regulations, committee organization, and other matters of internal management of the several schools and colleges. With respect to these rules the Board of Regents delegates plenary power to the several faculties of the schools and colleges and other authorities, all subject, of course, to the ultimate authority of the Board. These rules are adopted, amended, or repealed according to the procedures established by the several University authorities themselves. Power to adopt them may either be expressly delegated in the Board's Bylaws, or be implied from other powers conferred upon such authorities, or be implied from general usage. Since such rules are not filed with or approved by the Board of Regents, they do not appear on record in the *Regents' Proceedings.* They are recorded in the minute books of the authorities adopting them and in such other record repositories at are prescribed by the Bylaws of the Board.

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